

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN DOE, et al.,) Case No. 8:09CV456

Plaintiffs,)

vs.)

STATE OF NEBRASKA, et al.,)

Defendants.)

JOHN DOE,)

Case No. 4:09CV3266

Plaintiff,)

vs.)

NEBRASKA STATE PATROL, et al.,)

Defendants.)

JOHN DOE,)

Case No. 4:10CV3005

Plaintiff,)

vs.)

STATE OF NEBRASKA, et al.,)

Defendants.)

Lincoln, Nebraska

July 16, 2012

VOLUME I
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE RICHARD G. KOPF
UNITED STATES SENIOR DISTRICT JUDGE

Proceedings recorded by electronic sound recording, transcript
produced with computer.

A-P-P-E-A-R-A-N-C-E-S

FOR THE PLAINTIFFS: Mr. Rodney C. Dahlquist
Mr. Stuart J. Dornan
Mr. Thomas J. Monaghan
Attorneys at Law
Dornan, Lustgarten & Troia, PC LLO
1403 Farnam Street, Suite 232
Omaha, NE 68102

FOR THE DEFENDANTS: Ms. Katherine J. Spohn
Mr. Kevin L. Griess
Mr. Ryan S. Post
Assistant Attorneys General
2115 State Capitol Building
P.O. Box 98920
Lincoln, NE 68509-8920

1 (At 10:46 a.m. on July 16, 2012, the following
2 proceedings were had:)

3 THE COURT: Please be seated. Thank you.

4 Good morning. We're on the record in John Doe and others
5 vs. the State of Nebraska. This is three case -- we're going
6 to try three cases, 8:09CV456, 4:10CV3266 [sic] and
7 4:10CV3005.

8 Counsel, please remain seated but now enter your
9 appearance. First for the plaintiffs.

10 MR. DAHLQUIST: Good morning, Your Honor. Rodney
11 Dahlquist appearing on behalf of the plaintiffs.

12 MR. DORNAN: Good morning, Your Honor. Stu Dornan on
13 behalf of the plaintiffs.

14 MR. MONAGHAN: And Tom Monaghan on behalf of the
15 plaintiffs.

16 THE COURT: Counsel.

17 MS. SPOHN: Good morning, Your Honor. Katie Spohn on
18 behalf of the defendant.

19 MR. GRIESS: And Kevin Griess as well.

20 MR. POST: Ryan Post.

21 THE COURT: Good morning again. Okay. A couple of
22 things. When we were to begin, I -- well, back up. I sent
23 you an e-mail on the 9th asking for a stipulation -- actually
24 two stipulations regarding the identification of the Does who
25 remain plaintiffs and their true names and the Does who were

1 named plaintiffs but no longer remain plaintiffs and their
2 true names.

3 Do you have the stipulations for me?

4 MR. DAHLQUIST: We do, Your Honor.

5 THE COURT: And have you provided copies to counsel?

6 MR. DAHLQUIST: I have. Mr. Griess and I worked on
7 this and we came up with a -- a stipulation. We integrated it
8 into one document.

9 THE COURT: That's perfectly fine.

10 MR. DAHLQUIST: Okay.

11 THE COURT: Would you come forward and give it to the
12 courtroom deputy, please.

13 Let me take a look at it.

14 Thank you.

15 This is very helpful. Thank you.

16 I'll direct the court clerk -- well, first of all, I'm
17 going to hand this to Janine Rempe, my senior law clerk, and
18 we'll make copies for our office and then give it to the
19 courtroom deputy who will file it as a restricted document. A
20 restricted document means that it's available to counsel but
21 no one else, okay?

22 MR. DAHLQUIST: Yes, sir.

23 UNIDENTIFIED MALE SPEAKER: We have an extra copy if
24 you want one.

25 THE COURT: That'd be great, sure, if you want to

1 give us an extra copy.

2 You can -- you can just upload that -- well, why don't
3 you change with Jan. I don't know which one's the original.
4 Thank you.

5 UNIDENTIFIED MALE SPEAKER: I think they're just
6 copies. All electronic signatures are on there.

7 THE COURT: Okay. Thank you. Now, with respect to
8 the stipulation with -- in -- in regard to the plaintiffs who
9 are no longer plaintiffs, how shall I -- I need to enter some
10 kind of an order dismissing them. The question I suppose is
11 whether the dismissal should be with or without prejudice.
12 Will you advise me, please?

13 MR. DAHLQUIST: Judge, I would ask that that be
14 without prejudice and -- and the reason for that being the --
15 the plaintiffs have brought both a facial and an as-applied
16 challenge --

17 THE COURT: Uh-huh.

18 MR. DAHLQUIST: -- to these statutes. My concern is
19 that if the Court were to dismiss with prejudice, if they were
20 to experience a change in circumstances or something, that
21 would render their claim for the as-applied portion at least
22 different than it stands today or has stood during the
23 pendency of the case. Then -- My concern is just being
24 precluded from then bringing an action in the event something
25 changes.

1 THE COURT: Okay. Let me hear from the defendants.

2 MS. SPOHN: Judge, if -- I'm pretty sure that each of
3 the Does that is no longer a plaintiff you have already
4 dismissed from the case, and we can get you the ECF filing
5 number for each of those over the lunch hour if you want us to
6 but I'm not sure you have to dismiss anyone now 'cause you've
7 already done so.

8 MR. DAHLQUIST: And -- and that's correct. I think
9 there were a number of orders. The only -- There were two
10 that we moved to dismiss recently and --

11 THE COURT: Yeah, I granted those without prejudice.

12 MR. DAHLQUIST: Without prejudice. If those two --
13 and that's correct. So then there would be an order as it
14 relates to -- should be an order as it relates to all of the
15 plaintiffs dismissing them without prejudice.

16 THE COURT: Well, if you're all satisfied with that,
17 then I'll just leave the record as it is and we'll proceed
18 accordingly. Is that okay?

19 MR. DAHLQUIST: Yes.

20 THE COURT: Is that okay?

21 MS. SPOHN: Yes, Your Honor.

22 THE COURT: Okay. Then that's what we'll do.

23 That then takes me to the seventh issue in my e-mail.
24 The parties have stipulated in their pretrial conference order
25 that the requirements under Neb. Rev. Stat. Section

1 29-4006(1)(k) and (s) that someone has an obligation to
2 provide "Internet Protocol addresses" and "global unique
3 identifiers" based on the technology as it exists today are
4 overbroad and unduly burdensome. That's what the parties have
5 stipulated with respect to Internet Protocol addresses and
6 global unique identifiers.

7 I construe that as an admission by the State that those
8 provisions of the statute with respect to Internet Protocol
9 addresses and global unique identifiers are unconstitutional.

10 MS. SPOHN: As technology exists today, Your Honor,
11 yes, that's true.

12 THE COURT: All right. Okay. That I think clears up
13 the issues that I wanted to take up. For those of you who
14 don't know, Janine Ram- -- or Rempe, she's my senior career
15 law clerk, will be helping with this -- helping me with this
16 case and then Paige Amundson, who is a law student at the
17 University of Nebraska College of Law, and an intern, will be
18 helping as well so those two folks are here in the courtroom.

19 I'm prepared to proceed as you wish. If you want to make
20 opening statements, that's perfectly okay with me and then we
21 can begin taking evidence.

22 So with that by way of introduction, do you care to make
23 an opening statement, counsel?

24 MR. DAHLQUIST: We'll make opening statements, Your
25 Honor.

1 THE COURT: Okay. And you can make it from the
2 seated position.

3 MR. DAHLQUIST: Thank you, Judge.

4 Your Honor, this is a case that questions the
5 constitutionality of what the State intended as a
6 one-of-a-kind, first-of-its-kind piece of legislation. The
7 question boils -- There's a number of questions for the Court
8 to resolve and I can provide just a quick background of how we
9 got here.

10 This is -- As the result of the Adam Walsh Act, the
11 federal government provided financial incentives for states to
12 pass minimum requirements with their sex offender -- with
13 their respective sex offender registries.

14 THE COURT: Right.

15 MR. DAHLQUIST: Nebraska spearheaded by the Attorney
16 General's Office used this as an opportunity to, again, like I
17 said, pass what was phrased as a first-of-its-kind piece of
18 legislation. In doing so, Your Honor, it went far beyond what
19 was required under federal Adam Walsh in many respects, and
20 the Court has identified those, and those are the statutes
21 that are at issue here today.

22 The plaintiffs challenged this, and the parties filed
23 what I consider to be dueling summary judgment arguments and
24 motions, and the Court resolved by and large most of the
25 issues but -- but the questions we have to get to today,

1 Judge, are whether the State is allowed to say to someone
2 because of a conviction that you had in the past you are now
3 no longer allowed to use what the State has defined as social
4 networking, chat room and instant messaging.

5 The evidence will show that those terms are vague and so
6 broad as to encompass all of what we consider the Internet.
7 It's pretty clear that society today runs a large part of
8 commerce, we communicate with our families, friends,
9 colleagues and maintain our employment by and large by the use
10 of the Internet.

11 So the question is can the State take that ability to use
12 those tools away from someone because of a prior conviction?

13 The question also as it relates to one Doe, Doe 24, who
14 is currently on parole, whether the State can --

15 THE COURT: You -- you know, as to parole the Supreme
16 Court case just blows you out of the water, doesn't it? I
17 mean, let's not kid a kidder.

18 MR. DAHLQUIST: It -- it --

19 THE COURT: I mean, it --

20 MR. DAHLQUIST: Well, it certainly doesn't help.

21 THE COURT: It basically --

22 MR. DAHLQUIST: I'll acknowledge that, Your Honor.

23 THE COURT: California says -- well, tell me what --

24 MR. DAHLQUIST: Sure.

25 THE COURT: -- California said.

1 MR. DAHLQUIST: Yeah. In -- in the *Samson* case --

2 THE COURT: Yeah.

3 MR. DAHLQUIST: -- Your Honor? Basically, it says it
4 depends on what the terms of parole are. If the terms of
5 parole indicate that there is the right to go forward and --
6 and conduct these invest- -- or conduct a search, then there's
7 no suspicion required -- no reasonable suspicion required.

8 THE COURT: Well, there was a statute there in
9 California, right?

10 MR. DAHLQUIST: And it said -- I believe -- and I
11 have to look real quick but I believe it said it can't be
12 arbitrary or -- or there was some minimal -- minimal
13 guidelines that was provided to law enforcement.

14 THE COURT: Okay. And -- and -- and then written
15 into the -- this guy's parole conditions -- written into this
16 guy's parole conditions were the search provision, right?

17 MR. DAHLQUIST: A search -- in -- into this
18 particular --

19 THE COURT: No, no.

20 MR. DAHLQUIST: -- Doe 24's --

21 THE COURT: To the California.

22 MR. DAHLQUIST: In the California one, yes, sir.

23 THE COURT: The same thing here, right?

24 MR. DAHLQUIST: Well, it's the same but it's also
25 very different, Judge. And the particulars of Doe 24 are

1 he -- he's already completed his sentence for the offense that
2 placed him on the registry first and foremost.

3 THE COURT: Yeah.

4 MR. DAHLQUIST: He -- he completed that a year ago.

5 THE COURT: Yeah.

6 MR. DAHLQUIST: He's -- he's now back on parole for
7 a -- a different offense --

8 THE COURT: Sure.

9 MR. DAHLQUIST: -- an unrelated non-registerable
10 offense.

11 THE COURT: Right.

12 MR. DAHLQUIST: In his case, Judge, the --

13 THE COURT: If there wasn't a statute here, the State
14 could do what -- what it wants to do anyway, right? 'Cause
15 he's -- in his parole condition, it says we get to come and
16 search.

17 MR. DAHLQUIST: Well, it does and it doesn't. That's
18 where we have a little bit of a conflict there. There's some
19 ambiguity. There's actually -- there's some general terms of
20 parole that -- that indicate that, yeah, he can be searched by
21 his parole officer or an employee of the parole
22 administration.

23 THE COURT: Why don't you read it to me. Do you have
24 it in front of you?

25 MR. DAHLQUIST: I will have it, Judge.

1 THE COURT: If -- you know, we can get to it. If you
2 don't have it easily in front of you, I don't want...

3 MR. DAHLQUIST: It was the last one, of course.

4 THE COURT: Of course.

5 MR. DAHLQUIST: There -- there's actually two
6 provisions that apply here, Your Honor.

7 THE COURT: Okay.

8 MR. DAHLQUIST: Search and seizure. You shall permit
9 your parole officer and/or personnel of parole
10 administration --

11 THE COURT: Right.

12 MR. DAHLQUIST: -- to conduct routine searches of
13 your person, residence, vehicle or any property under control
14 at such times as they deem necessary.

15 So I'd say in that sense it's limiting its scope to who
16 can conduct the search, who this individual can expect to
17 conduct the search.

18 There's also additional terms that are listed in his --

19 THE COURT: Well, all the parole office has got to
20 do -- his parole officer -- and they probably do this anyway.
21 That's how we did it in the federal system. A pretrial
22 service officer or probation officer calls the local cops to
23 say we're going to exercise our search rights, give us a -- a
24 cop with a gun, although we're armed, we're in plainclothes,
25 and so a cop shows up and they walk into the house and do

1 their search.

2 MR. DAHLQUIST: Well, and I think under those terms
3 they've done it according to the terms of parole.

4 THE COURT: Right.

5 MR. DAHLQUIST: But I think what the Nebraska
6 registry 29-4006(2) does was basically does away with even
7 that minimal confine, Your Honor, and that minimal --

8 THE COURT: Well, as applied to --

9 MR. DAHLQUIST: -- procedural requirement.

10 THE COURT: Okay. Let's hold on for just a minute.

11 MR. DAHLQUIST: Sure.

12 THE COURT: As applied to 24, the statute doesn't
13 hurt 24 'cause he's already -- he -- he's already signed these
14 conditions that allow -- allow them to -- the State to do what
15 it is he doesn't want them to do.

16 MR. DAHLQUIST: Well, it -- it does hurt 24, Your
17 Honor, because it actually -- the terms of his parole go on to
18 say there's -- there's specifics that apply to him as well,
19 and -- and it's a check-the-box system, and if the box is
20 checked, that term applies to you.

21 THE COURT: Right.

22 MR. DAHLQUIST: One of the ones that is specifically
23 not checked -- there's only three that are checked. They
24 relate to continue his alcohol monitoring, (unintelligible),
25 things of that nature. But what's not checked, Your Honor, is

1 you shall not use a computer for any purpose that might
2 further sexual activity. That's not checked.

3 The other one is you shall not engage in interpersonal
4 communication, including but not limited to chat rooms,
5 instant messaging and so forth. That's not checked.

6 The other one is you shall consent to unannounced
7 examination, parentheses, search, of any and all computers
8 and/or devices to which you have access to. This consent to
9 examine including access to data and other -- other kind of
10 ancillary electronic devices. That is not checked.

11 So -- so that's not a condition of his parole. So the
12 Statute 29-4006(2) does undermine what examination he would
13 have as a result of this not being checked.

14 THE COURT: Well, a general search condition is about
15 as broad as you can make it, isn't it?

16 MR. DAHLQUIST: Well, it seems -- it seems to be
17 broad in -- in a sense as it relates to this particular
18 parolee, Judge, but what 29-4006(2) does was to expand that to
19 say anything within your possession. And I've got a copy of
20 the statute.

21 THE COURT: Well, but -- okay. But -- but in the
22 *Samson* case, wasn't there a statute -- California statute?

23 MR. DAHLQUIST: There was and I -- if I'm -- if I'm
24 recalling this correctly, Your Honor, and I have to apologize,
25 but it seemed like there was a statute that -- that provided

1 some minimum level of -- it could not be done in an arbitrary
2 manner. The search could not be arbitrary and if that -- I
3 believe that's what the statute -- and I believe that's what
4 you're referring to, Judge.

5 THE COURT: Okay. I get your point but do you have
6 any case that parses the *Samson* case the way you want me to
7 parse it?

8 MR. DAHLQUIST: Well, I don't think that there's any
9 specific authority, Judge. I think this statute goes so
10 far -- and -- and I guess there's another point that I'd like
11 to make.

12 THE COURT: Sure.

13 MR. DAHLQUIST: This is talking just about search.
14 29-4006(2) talks about search and the installation of some
15 type of hardware or monitor for ongoing real-time monitoring.

16 THE COURT: Right.

17 MR. DAHLQUIST: Nowhere in the terms of parole for
18 Doe 24, either in the general ones or the more specific ones,
19 does it say anything about that.

20 THE COURT: No. But -- but if the -- if you have a
21 Fourth Amendment claim, it's got to turn on issues of whether
22 you have some reasonable expectation of privacy in the area to
23 be searched, and if this guy has said it's okay with me that
24 you come in anyplace I'm -- I'm at to search, then what basis
25 does he have to complain that somebody's going to do that and

1 install a monitoring device on his computer?

2 MR. DAHLQUIST: Well, I think in -- in -- it's a
3 couple different ways, Your Honor, and I think some of the
4 testimony will -- will elicit this.

5 THE COURT: Sure.

6 MR. DAHLQUIST: A number of Does have been visited by
7 law enforcement on an extremely regular -- on a very regular
8 basis and not just by one law enforcement agency. They'd get
9 visited by Omaha police, Lincoln police, Douglas County
10 Sheriff, State Patrol, and they'll do so, you know, kind of in
11 consecutive order so it's fairly regular and it's -- it's all
12 the time.

13 Apparently, what 29-4006 is doing is saying we're not
14 just going to limit this to parole which was the agreement
15 that Doe 24 entered into with -- with the parole
16 administration for parole administration officers or employees
17 to come and search. It would expand that out to include all
18 of these other law enforcement agencies that could just come
19 arbitrarily at any point in time to conduct a search. So I
20 think it goes beyond the confines of what he agreed to.

21 THE COURT: Okay. Go ahead. I interrupted you.

22 MR. DAHLQUIST: Well, I think we covered the Fourth
23 Amendment issue to -- to -- to the degree I wanted to, Your
24 Honor.

25 THE COURT: You don't have any stalking horse,

1 meaning plaintiff, who's on probation now, do you?

2 MR. DAHLQUIST: No, sir. No, sir.

3 THE COURT: So I can't -- I don't have a real context
4 in which to evaluate that issue.

5 MR. DAHLQUIST: Understood. There -- there is only
6 the one Doe and he is on parole under -- under the terms of
7 parole, that's correct.

8 THE COURT: All right. So we're really -- so insofar
9 as the Fourth Amendment issue is concerned, we're talking
10 about two categories of Does or plaintiffs. Those categories
11 of Does who were on probation, parole or supervised release --
12 pardon me. Anybody who was convicted or was on probation,
13 parole or supervised release after January 1st, 2010, and who
14 is no longer under the supervision, and we have -- what? --
15 five of those?

16 MR. DAHLQUIST: There's about five.

17 THE COURT: Anyway, there's -- there's some --

18 MR. DAHLQUIST: Yeah. There's -- there's --

19 THE COURT: -- relatively small number.

20 MR. DAHLQUIST: That's right.

21 THE COURT: And then we have Doe 24 who's on parole?

22 MR. DAHLQUIST: That's correct, Your Honor.

23 THE COURT: Now, as I've already held the statute
24 unconstitutional with respect to people who were convicted
25 prior to January 1st, 2010, and who were -- were off

1 probation, parole or supervised release prior to that date,
2 right?

3 MR. DAHLQUIST: Yes, sir.

4 THE COURT: Okay. So I'm really concentrating --
5 what is it -- six plaintiffs here?

6 MR. DAHLQUIST: That -- that would be correct and --

7 THE COURT: For the as-applied challenge.

8 MR. DAHLQUIST: For the as-applied. And -- and
9 that's correct, Your Honor, yes.

10 THE COURT: Okay. Go ahead.

11 MR. DAHLQUIST: Well, and -- and my understanding is
12 because those individuals have come off probation, parole,
13 supervised release, whatever court-monitored supervision they
14 were -- then they would fall under the Court's order as it
15 relates to individuals who have completed their sentence.

16 THE COURT: Go ahead.

17 MR. DAHLQUIST: There's -- in addition to the Fourth
18 Amendment, Your Honor, there's significant implications under
19 the First Amendment on a couple of different grounds. One
20 being can the State, like I said, just basically eliminate
21 someone's ability to communicate through what are the most
22 common mediums used today for commerce --

23 THE COURT: Well, and --

24 MR. DAHLQUIST: -- and social...

25 THE COURT: -- and due process. You've got a -- a

1 vagueness claim running throughout all of that. What -- what
2 does it -- what does this really mean?

3 MR. DAHLQUIST: That -- that's correct. There's --
4 there's a due process claim because -- the -- the ambiguity --
5 and -- and what the Court didn't have at summary judgment was
6 a good representation of how far this statute stretched, how
7 all-encompassing it really is, and that's what the testimony
8 will be provided to the Court today through Professor Post.

9 The vagueness part of it is some of the terms were kind
10 of unknowable but at the same time the way that the statute
11 has been drafted, it can either mean -- and Professor Post
12 will testify to the fact that could either mean nothing and
13 cover nothing or it could mean --

14 THE COURT: Everything.

15 MR. DAHLQUIST: -- everything.

16 THE COURT: Yeah.

17 MR. DAHLQUIST: And quite frankly, you know, our
18 position is unambiguously the statute is written to include
19 everything. There'll be some attempt to impose some age limit
20 that simply is not there, either unambiguously because of the
21 wording of the statute or in practice. So an attempt to limit
22 this or mitigate the effects, scope of -- of the definitions
23 through the use of an age limitation is just simply not real,
24 Your Honor. That -- that kind of gets to the vagueness and
25 the due process part of it.

1 The First Amendment's also implicated because of the type
2 of information that is reported, and some of the changes --
3 one of the major changes that were enacted under the -- under
4 SORNA was the requirement to provide online identifiers.
5 Again, the State of Nebraska in an attempt to create this
6 first-of-a-kind restrictive, punitive type of statute went far
7 beyond what SORNA requires.

8 It requires you unambiguously under the definitions in
9 the statute to register your passwords, your online
10 identifiers, where you post information, web sites you
11 maintain, basically anywhere you go online, and provide any
12 type of commentary, opinion, whether that be I don't agree
13 with sex offender laws or I don't like how this particular
14 public official is doing his or her job, you have to report
15 that, and while we can parse this out and kind of split the
16 hair real fine and say, well, we're not reporting the words
17 you type, if you say here's my name, here's my password,
18 here's where I post everything online, you're basically giving
19 full access.

20 And what that does, Your Honor, is it undermines your
21 ability to speak anonymously online which the Supreme Court
22 has said implicates core political speech.

23 So --

24 THE COURT: So to put this in a specific frame, let's
25 say I go on Doug Berman's blog, Sentencing Law and Policy, and

1 Berman thinks that these sex offender registration laws are
2 goofy and way -- way too restrictive, and I post on that blog
3 an anonymous comment to Berman's commentary, what do I have to
4 do if I'm a register?

5 MR. DAHLQUIST: Well, Your Honor, you have an
6 unambiguous obligation to go -- well, presuming you're not
7 violating the -- the law of the --

8 THE COURT: Let's say Berman -- let's assume for the
9 sake of -- of argument that we aren't going to argue at this
10 point about whether 13-year-olds can access this.

11 MR. DAHLQUIST: Sure, okay.

12 THE COURT: Okay?

13 MR. DAHLQUIST: Eliminating that element, Your Honor,
14 you have an obligation to by the next day go to the State
15 Patrol or the sheriff or whomever it is in your jurisdiction
16 that's collecting this information and tell them this is the
17 web site I went to, this is the name I used and what -- the
18 other key is that it is done the next day because it's done
19 almost contemporaneously. It's a contemporaneous
20 self-reporting. 29-4006, I believe it's subsection 13,
21 requires you to go by the next working day and report that.

22 THE COURT: So -- so if my comment is, I agree with
23 you, Professor Berman, that these are goofy laws --

24 MR. DAHLQUIST: Uh-huh.

25 THE COURT: -- and I write that and I post it

1 anonymously, the next day I've got to go to the Patrol and
2 tell them I posted on Professor Berman's blog under the --
3 under the name Anonymous? That's my reporting?

4 MR. DAHLQUIST: That's what 4006(1) sub s says.

5 THE COURT: Miss Spohn; is that right?

6 MS. SPOHN: Only if you've never done it before, Your
7 Honor. If you've never been to Berman's web site before and
8 uploaded content before 'cause it says you're required to
9 identify all sites at which you have or intend to post
10 comments and blogs.

11 So if when you initially register you provide a laundry
12 list of web sites that you plan to visit and upload comment
13 and web site -- and web sites that you plan to talk -- message
14 on -- post messages on, you have no obligation to go the very
15 next day if you previously reported that to the State Patrol.

16 THE COURT: But the first time you do?

17 MS. SPOHN: Correct, Your Honor.

18 THE COURT: And then if you use another pseudonym
19 that you haven't previously disclosed, you've got an
20 obligation? Anonymous 2.

21 MS. SPOHN: I believe so, Your Honor. If you were to
22 use a new pseudonym? Is that what your question was?

23 THE COURT: Yeah. The first one is just Anonymous.
24 The second one is Anonymous 2 but you didn't previously
25 disclose Anonymous 2.

1 MS. SPOHN: Yeah.

2 THE COURT: Okay. Go ahead, counsel.

3 MR. DAHLQUIST: I think it's pretty clear why that
4 implicates the First Amendment, Your Honor. You're -- if
5 you're talking about having to report the place you post
6 information, content, commentary, whatever that might be,
7 under which name you post that information, content,
8 commentary, and I guess at least on the first time where --
9 what time you did that, that allows basically some type of de
10 facto self-reporting. It's monitoring, whatever it might be,
11 that implicates your ability to speak online anonymously, and
12 if you are eliminating the ability to speak online
13 anonymously, we're talking about implicating core political
14 speech. So -- so it's pretty clear why that implicates the
15 First Amendment.

16 THE COURT: Okay. Let me ask you this.

17 MR. DAHLQUIST: Uh-huh.

18 THE COURT: Let's assume I agree with you that's
19 stupid and way overbroad and -- and not sufficiently
20 restrictive, all the magic language of the First Amendment.
21 What's the -- It is undisputable -- indisputable, rather,
22 that predators use social networks, right? You don't dispute
23 that?

24 MR. DAHLQUIST: Well, no. I think that's at least on
25 a -- sure, absolutely. Absolutely.

1 THE COURT: Okay. So what's the State to do? I
2 mean, how do they get at the places that kids use and -- and
3 predators know they use, Facebook, whatever?

4 MR. DAHLQUIST: Well --

5 THE COURT: I mean, I suppose you're -- you're --

6 MR. DAHLQUIST: I -- I could tell you how not to do
7 it, Your Honor, and it would be by completely banning them
8 from the Internet which is what this does. If -- if the goal
9 of the State is to say we don't want certain individuals
10 communicating with minors, there would be a way to craft
11 language more precisely and more narrowly to get to that, and,
12 in fact, the State has already done that, Your Honor.

13 It has criminalized the -- the crime of online
14 enticement. It's a crime under the State of Nebraska.

15 THE COURT: No, no, I understand that. But they --
16 the State doesn't have to sit back -- the State doesn't have
17 to sit back and wait until some kid gets hurt. The State has
18 a perfect right to be proactive. So my question is if I'm
19 sitting here over at the legislature and I -- you know, all I
20 want to do is separate predators or potential predators from
21 kids, how do I do that?

22 MR. DAHLQUIST: I -- I think one way you do it is you
23 fund law enforcement, Your Honor. I mean, there -- there are
24 other ways to do it. We could -- we could -- you know, can --
25 we could have more individuals online posing as minors, more

1 law enforcement online posing as minors. That way we're
2 actually --

3 THE COURT: That incidentally has become a cottage
4 industry. There's -- there's huge numbers of people doing it.
5 I had an opportunity to see that for a variety of reasons.

6 MR. DAHLQUIST: Well, and I think that would be one
7 way to actually -- here -- here's the problem.

8 THE COURT: You're saying it's an all or nothing
9 proposition, that there's no way to do what the State wants to
10 do here?

11 MR. DAHLQUIST: Well, and I'm going to hedge my
12 answer a little bit. We're here to challenge this law, Your
13 Honor, but I understand the Court's question.

14 THE COURT: Well, the --

15 MR. DAHLQUIST: The -- the -- I --

16 THE COURT: Wait a minute. The -- the reason that
17 I'm asking the question is -- is -- is not simply to cause you
18 angst but because one of the tests of -- as you know is what?
19 Essentially --

20 MR. DAHLQUIST: Well --

21 THE COURT: -- have they used a reasonably least
22 restrictive alternative?

23 MR. DAHLQUIST: Sure, sure. Is this the least --

24 THE COURT: So -- so --

25 MR. DAHLQUIST: -- is this tailored to the degree it

1 needs to be?

2 THE COURT: Yeah, yeah. You know, whatever the magic
3 language is. So the question I'm putting to you is what --
4 how could they have done this in a way that would have been
5 less intrusive but accomplished their goal?

6 MR. DAHLQUIST: Well -- and -- and I don't want to
7 infringe on what Professor Post can testify to but I think the
8 State could have in certain circumstances said, look, if you
9 are a certain individual, you simply cannot go online and
10 communicate with minors. Now, I don't know if that would be
11 constitutional or not.

12 You could target the person who's making the statement
13 and the person who's receiving the communication. Basically,
14 the concern is online communication. You could limit who's
15 sending it and who's receiving it. The way not to do it is to
16 just blow up the whole system. I think the language is burn
17 the house to -- to cook the roast or burn the whole --

18 THE COURT: Let me ask you this -- It's been so long
19 since I've had children of that age but let's assume that the
20 marketing people could tell us, and they probably can, what
21 the market penetration is -- what the demographics are for a
22 variety of social networks, Facebook, that sort of thing, and
23 the statute said, okay, if you're one of these people, you
24 can't use Facebook. Isn't that a -- a reasonable restriction?

25 Let's -- let's assume that 200 million kids use Facebook.

1 Okay. We acknowledge that it's Facebook. Or we -- we -- we
2 say, oh, no, that's going to be a problem 'cause we're always
3 going to have to rewrite the statute. Then we give to the
4 State Patrol some very specific directions. You can -- you
5 can ban use under these circumstances. If the market
6 penetration of -- of -- of a site is -- if it has by the
7 last -- whoever accumulates these statistics shows 10 million
8 kids, then by regulation you can ban them.

9 Wouldn't that be a -- a perfectly okay restriction?

10 MR. DAHLQUIST: I -- I still don't believe it would
11 be, Your Honor.

12 THE COURT: Why?

13 MR. DAHLQUIST: Well, the test is when -- when we're
14 talking about tailoring, it's not just are we getting to --
15 are we prescribing what is otherwise protected speech in an
16 absolute sense --

17 THE COURT: Well, don't you --

18 MR. DAHLQUIST: -- as well as in a relatively sense.

19 THE COURT: -- want to tell me that maybe it would,
20 maybe it wouldn't, Judge, but it -- but at least it'd be
21 better than what we have now?

22 MR. DAHLQUIST: Well, if I can convince you that
23 you're still wrong, Your Honor, then I'm going to say that
24 what we have here is also wrong so -- but, yes, and -- and
25 basically the thrust of it is we're here to -- to address the

1 scope and the breadth and the depth of this statute.

2 But if you were to say -- even I -- I still think it's
3 constitutionally deficient to say certain individuals
4 convicted of these offenses cannot go on Facebook.

5 THE COURT: Why?

6 MR. DAHLQUIST: Because Facebook, Your Honor, not
7 only caters to minors and is used by minors, it's used by
8 businesses every day.

9 THE COURT: So what?

10 MR. DAHLQUIST: It's -- there is more protected
11 activity being engaged in on Facebook than there would be
12 unprotected activity that could be addressed in a different
13 manner.

14 THE COURT: Okay. And I asked you what the different
15 manner is and -- and -- and you wanted to tap dance. Tell me
16 what the different manner is.

17 MR. DAHLQUIST: Well, the different manner would be
18 if you are one of these people that we don't want
19 communicating with minors --

20 THE COURT: Yeah.

21 MR. DAHLQUIST: -- you can't go online and
22 communicate with minors.

23 THE COURT: We already say that and it doesn't work.

24 MR. DAHLQUIST: Well, then I guess the other option
25 would be, Your Honor, to, like I said, ramp up law enforcement

1 to the extent that would --

2 THE COURT: We already do that.

3 MR. DAHLQUIST: -- maybe capture --

4 THE COURT: We're throwing tons of money. The
5 Patrol's got -- How many people do you have sitting all day
6 looking at this crap?

7 MS. SPOHN: A lot. I can't give you an exact number
8 but it's a lot.

9 MR. DAHLQUIST: Well, one of the -- one of the
10 criticisms we raised at the beginning of this case, Your
11 Honor, is that statutes like Nebraska's and registries like
12 Nebraska that have done away with saying this person's
13 dangerous, this person we should keep an eye on, and this
14 person has a low risk to reoffend.

15 THE COURT: Right.

16 MR. DAHLQUIST: By eliminating that --

17 THE COURT: Right.

18 MR. DAHLQUIST: -- what we've done is basically --
19 now we do have a lumping problem. Yeah, we're -- we're
20 talking about prescribing speech by an individual -- and there
21 will be testimony to this -- that was of low risk to reoffend,
22 Level 1, who is now subject to the registry for life --

23 THE COURT: Right.

24 MR. DAHLQUIST: -- and would be subject to this
25 unlawful use of the Internet crime for life.

1 THE COURT: Right.

2 MR. DAHLQUIST: For life. He would forever be banned
3 when he didn't use any of the mediums but -- but still would
4 be -- that's -- that's the problem and -- and it is --

5 THE COURT: But you lost that --

6 MR. DAHLQUIST: And -- and I understand.

7 THE COURT: -- that -- that -- that's gone because --

8 MR. DAHLQUIST: That is gone.

9 THE COURT: -- because the feds said -- Congress said
10 that's perfectly okay to do. You don't have to have this --
11 this sorting mechanism.

12 MR. DAHLQUIST: We don't have to, Judge, but -- but
13 by eliminating some things, I think we have chosen as a policy
14 and the legislature has chosen as a matter of policy to accept
15 that there are problems with this and -- and to accept that
16 maybe the First Amendment doesn't allow us to just get to
17 those people we really truly do care about monitoring and
18 that's got to be a policy decision.

19 THE COURT: Go ahead.

20 MR. DAHLQUIST: Thank you, Your Honor.

21 All of these --

22 THE COURT: Mr. Monaghan wants you to say
23 something --

24 MR. DAHLQUIST: He wants me to say --

25 THE COURT: -- so go ahead -- go ahead and --

1 MR. DAHLQUIST: He wants me to say the State went way
2 beyond what was required here and -- and that dovetails nicely
3 into my final point for opening, Judge, is that this is an ex
4 post facto law. There's significant --

5 THE COURT: How do you ever prove incidentally under
6 the Supreme Court's test that the motivation here was
7 punitive?

8 MR. DAHLQUIST: I think we can.

9 THE COURT: I don't think you can.

10 MR. DAHLQUIST: Well, I think the evidence is going
11 to convince you otherwise, Your Honor. I certainly hope so.

12 THE COURT: Well, but I think you can fall back on
13 the second test but when -- when Judge Zwart -- and I agree
14 with her -- said you guys couldn't haul in three or four of
15 the legislators, which I think was the proper ruling, I don't
16 know what the Supreme Court means.

17 I don't -- I mean, unless some -- unless 49 of these
18 legislators stood up and said, oh, by the way, we are
19 intending to enact this retroactive legislation as a punitive
20 measure, I don't see how you ever really prove it.

21 MR. DAHLQUIST: Well, it's -- it's a problem of --
22 there's a couple issues that I think every plaintiff's
23 struggling -- or bringing an ex post facto claim is going to
24 struggle with, Your Honor, and that's, one, there's
25 statutory -- or there's case law out there that says passing

1 comments can't be attributed to the entirety of the
2 legislature.

3 THE COURT: Right.

4 MR. DAHLQUIST: Well, that -- that seems to be used
5 as a shield to say if there's a comment, you can never
6 attribute it to anyone else but that's not what it says.

7 THE COURT: Yeah. I think -- I think your probably
8 stronger argument is going to be whether or not we can prove
9 the body intended to act in a punitive manner. We can take
10 what statements we -- we know were made either in the floor
11 debate or otherwise and then look at the effect of the
12 statute, and when we marry those two things together, then
13 this sure looks punitive.

14 The search provisions, the -- we -- we take you
15 completely out of the Internet from your perspective. The
16 monitoring provisions -- those begin to look like exactly what
17 I do -- what I did on Friday when I sentenced somebody in a
18 kiddie porn case.

19 MR. DAHLQUIST: Absolutely. Absolutely, Your Honor.
20 And in many ways it goes beyond what some of those terms are.

21 THE COURT: Yeah. It's longer than my supervised
22 release term.

23 MR. DAHLQUIST: Yeah. Yeah. Well, and that -- this
24 is kind of bringing a lot of different ideas together, Your
25 Honor. It's -- it's because under supervised release you can

1 tailor those terms to that particular person's circumstances,
2 that particular conviction. Those -- those terms that you
3 impose on that person are intended to complete the punishment
4 aspect but also reintegrate --

5 THE COURT: Yeah. As a matter of fact, if I imposed
6 what -- if I imposed as a supervised release condition the
7 conditions that are imposed here and Dornan took me up to the
8 Eighth Circuit, they'd turn me around so quick. The
9 supervised release terms would get blown up in the Eighth
10 Circuit, which is not known for its liberality.

11 MR. DAHLQUIST: No. I'm not going to dispute you
12 there, Your Honor.

13 And -- and, absolutely. And that's -- that's the thrust.
14 I mean, the -- in your summary judgment order, you said --
15 Your Honor, you said look at these statutes discretely,
16 individually as well as cumulatively. Well, I think that
17 28-322.05 stand-alone is punitive if you were to tell someone
18 because of a prior conviction you can never use these mediums
19 ever again or for at least the period of time that you're on
20 the registry.

21 THE COURT: Which is at a minimum what?

22 MR. DAHLQUIST: The registry period would be 15 --

23 THE COURT: The minimum --

24 MR. DAHLQUIST: Well, 15 and if you asked for a
25 reduction, it would be 10.

1 THE COURT: But the statutory minimum absent the --
2 the grace of the --

3 MR. DAHLQUIST: Right.

4 THE COURT: -- the State is 15 years?

5 MR. DAHLQUIST: Fifteen years absent some additional
6 action. Fifteen, twenty-five or life. Yes, Your Honor. So
7 that stand-alone looks an awful lot like punishment.

8 THE COURT: How many Doe plaintiffs and who are they
9 would the retroactivity issue apply to?

10 MR. DAHLQUIST: That, Your Honor, I can -- for
11 28-322.05 -- for the -- the unlawful use crime?

12 THE COURT: Well, your entire retroactivity issue.

13 MR. DAHLQUIST: Well, it would apply to all of them.
14 It would apply to all of them in the sense that we're talking
15 about every -- every plaintiff is required to register all of
16 the information listed.

17 THE COURT: Your ex post facto claim.

18 MR. DAHLQUIST: The ex post facto claim.

19 THE COURT: The ex post facto claim is measured from
20 January 1, 2010, right?

21 MR. DAHLQUIST: Yes, sir.

22 THE COURT: Okay. How many plaintiffs were convicted
23 and off the registry -- pardon me, were convicted and no
24 longer on probation, parole or supervised release prior to
25 January 1, 2010, that this would apply to?

1 MR. DAHLQUIST: All but about five, I believe. All
2 but five.

3 THE COURT: All plaintiffs?

4 MR. DAHLQUIST: Well, Your Honor, at the time we
5 filed -- as of January 1, 2010, all of the plaintiffs but
6 for -- and -- and I don't want to give an inaccurate number
7 and I can find this out -- I believe there were five or so had
8 completed their -- their -- whatever terms of their sentence
9 were.

10 THE COURT: Yeah. My question is -- is real
11 specific. Which of the plaintiffs had been convicted, had
12 served their sentence and were no longer on supervised release
13 as of January 1, 2010?

14 MR. DAHLQUIST: I believe it to be Doe 12, Doe 13,
15 17, Doe 23 and 25.

16 THE COURT: Okay.

17 MS. SPOHN: You've got that backwards.

18 MR. DAHLQUIST: Oh, I have it backwards, I'm sorry.
19 I'm sorry. Yeah, all except for those five, Your Honor.
20 Those five were still under some court-monitored supervision,
21 whatever form that may be, as of January 1, 2010. The rest
22 had completed their sentence.

23 THE COURT: Okay. Now, are all -- all of the
24 plaintiffs in your stipulation then who are presently
25 plaintiffs -- are those all people who were criminal

1 offenders?

2 MS. SPOHN: The numbered -- the numbered Does were,
3 yes, Your Honor. There are lettered Does that are not.

4 THE COURT: And the alphabetic Does are spouses?

5 MS. SPOHN: Correct. Or children or some connection
6 with a Doe.

7 THE COURT: But are not offenders?

8 MS. SPOHN: Correct.

9 MR. DAHLQUIST: That's correct.

10 THE COURT: Okay. Thank you.

11 MR. DAHLQUIST: That's correct.

12 THE COURT: Go ahead.

13 MR. DAHLQUIST: Well, so in those senses, Your Honor,
14 that the new crime of the unlawful use looks a lot like and in
15 many ways goes pretty far beyond what we would consider to be
16 conventional -- a conventional form of criminal punishment.

17 When we couple that with the search and monitoring
18 provision to the extent it has some play and we couple that
19 with the expanded information that has to be disclosed, to the
20 extent that it does undermine First Amendment rights, all of
21 those taken in totality look a lot like punishment, and
22 they're foreign to SORNA.

23 They're not required under federal SORNA. They're not
24 required by the State. Just to take --

25 THE COURT: SORNA specifically says that nothing that

1 we're saying in here is meant to be exclusive or words --

2 MR. DAHLQUIST: Sure.

3 THE COURT: -- to that effect.

4 MR. DAHLQUIST: Sure. And it gives some -- some --
5 yeah, sure. It gives the states the ability. It's just a
6 minimum set of guidelines that have to be complied with in
7 order to not lose certain funding.

8 But I -- I just want to quickly take a step back -- and
9 then I'll conclude -- and look at the intent issue again.
10 Intent is not just what you say. You can infer intent also
11 from the circumstances that are -- the actual language is the
12 circumstances that are surrounding the passage of the bill.

13 Well, in this case what this is is a piece of -- these
14 are -- these are bills that were part of the Attorney
15 General's legislative package.

16 THE COURT: Sure.

17 MR. DAHLQUIST: These were generated by the Attorney
18 General's Office in collaboration with other state entities so
19 when we're talking about the circumstances surrounding this,
20 these are basically prosecutors creating a piece of
21 legislation. I think that gets to the punitive intent when
22 you look at the things that it eliminated. While the Court
23 has --

24 THE COURT: Well, the Attorney General's got
25 obligations far beyond prosecution. He's -- I mean, his

1 obligations are -- are -- he has certain obligations from a
2 criminal perspective, from a civil perspective and then aside
3 from the issue of prosecution he has concerns about protecting
4 the public proactively so he doesn't have to prosecute.

5 So the fact that it emanates from the Attorney General's
6 Office is hardly surprising. No more than it is from the
7 Justice Department when they -- when they propose all sorts of
8 legislation.

9 MR. DAHLQUIST: And -- and I would agree with you in
10 that sense, Your Honor, but what is surprising is the way it
11 was done and kind of the environment that was surrounding the
12 way this bill was passed. There's comments by the
13 legislators, there's comments by the attorneys -- the
14 attorneys that were working on this in the Attorney General's
15 Office that indicate some type of derision for sex offenders,
16 that they can never be reformed, that they can never be
17 reintegrated back into society and we don't think that that
18 can happen.

19 And so to the extent we can punish them again -- and this
20 is -- we're talking about a class of people --

21 THE COURT: Yeah. There's a difference between
22 saying sex offenders cannot be rehabilitated and sex offenders
23 ought to be punished again. One can hold one view without
24 necessarily holding another. But go ahead.

25 MR. DAHLQUIST: Well, and that -- and that's true.

1 We also have to take into consideration that there was
2 indication that the Attorney General's Office knew that at
3 least part of this statute, the search and monitoring
4 provision, was unconstitutional --

5 THE COURT: I'm going to be very interested in that.

6 MR. DAHLQUIST: -- was unconstitutional. Yes, Your
7 Honor. I -- I -- our office was as well.

8 THE COURT: Because -- because bless the attorney --
9 when Mr. Cookson came here originally, he fell on the sword
10 right away, which I would expect nothing less. I mean, it --
11 you read Judge Hamilton's opinion, I think it's pretty clear.
12 On the other hand, you could argue that that's just one
13 Federal District Judge in Indiana and who cares about -- I
14 mean, that's certainly not binding on -- on anybody around
15 here.

16 But it was a very thoughtful opinion. Of course, Judge
17 Hamilton's now in the Seventh Circuit. He's no schlep. But
18 if they were aware of it and they proceeded, maybe you're
19 right. Maybe there was something here that -- that indicates
20 a punitive concern.

21 MR. DAHLQUIST: Well, and I think the other part of
22 this is the timing of it also.

23 THE COURT: In what regard -- tell me what you're
24 referring to.

25 MR. DAHLQUIST: Their -- the communication between

1 the Attorneys General.

2 THE COURT: Yeah.

3 MR. DAHLQUIST: I can pull out the exact exhibit for
4 Your Honor.

5 THE COURT: Just summarize it.

6 MR. DAHLQUIST: Basically, it was an e-mail if -- I
7 believe it was generated from Mr. Cookson and the date I
8 believe is sometime in late April or early May of 2009 with a
9 comment saying search and monitoring provision found
10 unconstitutional, a federal cite, and about 15 to 20 minutes
11 later, I can't remember the exact, there was a response by one
12 of the other Attorney Generals saying I've taken a look at
13 this and it looks like it was decided under state law.

14 Obviously, the accuracy of that we can -- I mean, that's
15 not -- simply not the case. There was no mention of the
16 Indiana constitution in that --

17 THE COURT: Right.

18 MR. DAHLQUIST: -- case anywhere.

19 THE COURT: Right.

20 MR. DAHLQUIST: It was decided exclusively under the
21 Fourth Amendment. So the reason I brought up the dates,
22 though, Judge, is because I think it's important. That was
23 sometime in the spring -- and the exact date will be shown by
24 the exhibit -- but sometime in April or May. The Attorney
25 General, through other memorandum to law enforcement and

1 county attorneys, continued to promote this as a
2 first-of-its-kind piece of legislation. This is -- and
3 continued to promote this search and monitoring provision with
4 the knowledge that, hey, there's some issues -- this is
5 constitutionally suspect at the very least, and I think while
6 it is an Indiana district case and maybe isn't binding here,
7 it cites to Supreme Court cases.

8 THE COURT: Well, but -- but if Cookson was so -- I
9 mean, not Cookson. It apparently was some or -- some other
10 young man in the -- or young person in -- in the office. If
11 they were really motivated poorly, why did he come in and
12 almost immediately say, Judge, we're -- we aren't fighting
13 about this?

14 MR. DAHLQUIST: Well --

15 THE COURT: I mean, he was very straightforward.

16 MR. DAHLQUIST: Well, sure. And I think that gets to
17 the fact that going into this, going into January 1, 2010,
18 there was knowledge that that particular part at the very
19 least was unconstitutional.

20 THE COURT: Well, all I'm saying is it's possible for
21 Mr. Cookson to have thought -- or for the AG's office to have
22 thought throughout the drafting process that there's --
23 there's contrary authority out there but we can make a
24 reasonable argument on the other side, and then after the
25 statute is passed and they look at the statute in its entirety

1 conclude the better analysis is as Judge Hamilton set forth,
2 and we have an obligation to tell the Court that, and they do,
3 I don't see that as necessarily an indication of a punitive
4 intent. I suppose it's how you spin the facts.

5 MR. DAHLQUIST: Well, and that's it. And I don't
6 necessarily think we need to spin it a whole lot, Your Honor,
7 because we're putting that -- we're looking at these
8 discretely. We're looking at that. We're looking at
9 comments. We're looking at where this originated from. You
10 know, we're looking at different things along the spectrum and
11 you kind of touched on this at the beginning, Your Honor.

12 How do you go about proving intent when, you know, there
13 seems to be -- the test is kind of stacked against you? Well,
14 you have to pull from a number of different sources.

15 THE COURT: Well, I agree, yeah.

16 MR. DAHLQUIST: And -- and that's definitely one.
17 And I think that's a big one.

18 THE COURT: Your far stronger one is the introducer's
19 statement.

20 MR. DAHLQUIST: And there was a lot of comments made
21 there. A lot of comments made there. And that's where I kind
22 of specifically said that there was some type of derision and
23 revulsion that he expressed -- that Senator Lautenbaugh
24 expressed. He even indicated that, hey, I might not be the
25 right person to introduce this because I don't have an

1 unbiased -- and maybe he acknowledged his own self-limitation
2 that as -- as a legislator you shouldn't take on something
3 that you hold such strong opinions about.

4 I think that's an acknowledgement that he lacked
5 objectivity and maybe did his job in -- in a manner that --

6 THE COURT: Of course, the State's going to say you
7 can't attribute that to the other 48 members.

8 MR. DAHLQUIST: I'm sorry, Your Honor.

9 THE COURT: Go ahead.

10 MR. DAHLQUIST: Our plaintiffs --

11 THE COURT: Well, let me tell you something. Having
12 those two sitting next to you --

13 MR. DAHLQUIST: They wanted me to sit in the middle,
14 Judge, and I said no.

15 THE COURT: No, no. No, no. And -- and after we
16 take our break, I would tell them that you're deaf in the left
17 ear. Go ahead.

18 MR. DAHLQUIST: Well, it -- at some point along the
19 way -- you know, to kind of address what the Court was saying,
20 at some point along the way, if there was an acknowledgement
21 that, hey, maybe this is unconstitutional, that could have
22 been acknowledged. It took a lawsuit -- it took a lawsuit and
23 it took a hearing -- when this case was filed, we could have
24 been provided with a stipulation that, hey, this particular
25 provision at least we understand is unconstitutional but it

1 took a filing of a lawsuit because this is affecting -- this
2 has far-reaching effects for a lot of our clients --

3 THE COURT: Sure.

4 MR. DAHLQUIST: -- so they came to us to file this
5 lawsuit.

6 It took this lawsuit and it took the Court scheduling a
7 preliminary injunction hearing for that to happen. So I think
8 that indicates that, you know, somewhere along the way maybe
9 that happened, maybe it didn't. We don't know that. But it
10 took this lawsuit and it took the Court to call us all down
11 here before you for the State to make that concession.

12 And -- and I think when taken in totality, when we look
13 at the aggregate of all of this, you can't go online, you
14 can't -- it seems to indicate that you can't pick up a cell
15 phone. You can't pick up a landline and call someone. These
16 Internet -- it's not an Internet restriction so much as it is
17 a forms of communication restriction.

18 It just so happens that the Internet is by and large used
19 today so freq- -- is -- is used so frequently that it -- it
20 kind of seems to be subsuming the communication prohibition
21 but that's really what this is, and when you take all those
22 and -- and you take all that prohibition and you take the --
23 the manner in which this was codified, you take the statements
24 that were made not only by Senator Lautenbaugh but also by
25 the -- what appears to be the individual in the Attorney

1 General's Office that wrote the bill, that had the final say
2 in some sense as to how the terms were defined, when you
3 look --

4 THE COURT: Is this Mr. O'Brien?

5 MR. DAHLQUIST: This is Mr. O'Brien, yeah. And --
6 and his communication to Senator Lautenbaugh when -- when the
7 two of them were -- well, it seems like he was presenting
8 Senator Lautenbaugh with here's our bill. He says, look, if I
9 could I'd ban them from the Internet forever but that would be
10 unconstitutional. Well, what the State wrote was something
11 that bans them from the Internet forever and so it seems to be
12 that even Mr. O'Brien would acknowledge that what was written
13 is unconstitutional.

14 When you take that and you couple it with again the
15 information that has to be required -- again, Judge, this
16 includes passwords. One of the things that is specifically
17 included in the definitions of chat room identifiers and
18 instant message identifiers is user name and password.

19 Well, there wouldn't be any reason to collect a password
20 if you just wanted to monitor. What they want to get to is
21 watching who -- where these people go on the Internet, what
22 they're doing, who they're talking to, comments they're
23 making, whether innocuous or criminal.

24 You take all these together, Judge, and you're violating
25 the First Amendment, you violate the ex post facto clause.

1 They're written in such a manner as to be vague both for a
2 person attempting to comply with the law -- frankly, we have
3 to have Professor Post come in to tell us how this is going to
4 work. If we need an expert to the degree and the stature of
5 Professor -- Professor Post to come in and tell us, I don't
6 know how a man on the corner could possibly know what's
7 prohibited.

8 When you're talking about all of these things, Judge,
9 we -- we believe that the evidence is going to show that these
10 are unconstitutional and we'd ask you to rule in that manner.

11 THE COURT: Thank you.

12 Counsel.

13 MS. SPOHN: Thank you, Your Honor. We're here today
14 asking the Court to uphold Nebraska's efforts to protect its
15 children against online sexual predators. Plaintiffs are
16 challenging both facially and as applied the constitutionality
17 of our revisions --

18 THE COURT: Do you concede that they can do that?

19 MS. SPOHN: Do I concede that they can --

20 THE COURT: Bring both a facial and -- and -- and an
21 as-applied challenge?

22 MS. SPOHN: A facial challenge to the extent that it
23 has not been forced against these individuals at this --
24 against these particular Does? Is that what you mean? This
25 is not a class action that they're asking as a facial. Is

1 that what you mean?

2 THE COURT: What I asked -- what I mean is what I
3 ask. Do you concede the plaintiffs -- these plaintiffs may
4 bring both a facial and an as-applied challenge?

5 MS. SPOHN: To the extent the law has been applied --
6 as applied to them, yes, they can.

7 THE COURT: Well, then what does the facial challenge
8 mean?

9 MS. SPOHN: Is there any way that this law can be
10 interpreted...

11 THE COURT: And you con- -- and you concede that
12 these plaintiffs may bring that facial challenge?

13 MS. SPOHN: I don't think so, Your Honor.

14 THE COURT: Okay. Why can't they? Incidentally, you
15 can go deaf in your right ear.

16 MS. SPOHN: Apparently, I am.

17 THE COURT: No, you can consult with your -- with
18 your co-counsel if you like.

19 (An off-the-record discussion was had.)

20 MS. SPOHN: Judge, they've been going forward
21 facially and as applied since the beginning of this and --

22 THE COURT: And no one's raised that.

23 MS. SPOHN: And no one has raised that. And...

24 THE COURT: And you aren't raising it?

25 MS. SPOHN: And we aren't -- we have not raised it in

1 our post -- in our pretrial brief, no, Your Honor.

2 THE COURT: All right. So go ahead.

3 MS. SPOHN: There's three provisions that are at
4 issue here. The mandatory disclosure of e-mail addresses and
5 online identifiers. That's being challenged under the ex post
6 facto and the free speech clause. I think those are the two
7 provisions that apply -- or the two issues that apply to that
8 statute.

9 The consent to search and monitor provision as applied to
10 individuals on probation, parole and court-monitored
11 supervision. Doe 24 is challenging that as applied to himself
12 both facial- -- and then -- but as to the remaining
13 plaintiffs, none of them are on probation and none have been
14 on probation since January 1 of 2010; therefore, the ex post
15 facto claims as applied to them are moot.

16 Finally, there's the third crime -- the new crime which
17 prohibits child abusers from communicating on social
18 networking, instant messaging and chat room services that
19 permit minors to use their services. That provision's being
20 challenged under the ex post facto, the due process and the --
21 the free speech of the First Amendment.

22 We'll present evidence over the course of the next
23 several days that each of these provisions withstand the
24 plaintiffs' constitutional challenge.

25 As the Court has heard repeatedly since the inception of

1 this case, the Internet is the online equivalent of a
2 real-world playground but unlike the real-world playground
3 where adult supervision helps prevent offenders from pursuing
4 their victim, in the virtual world the offender has the
5 opportunity and the luxury of unsupervised time to groom a
6 child over a period of time and to develop a false trust with
7 that child and to build on that trust until the offender
8 convinces the child to meet in the real world for an illegal
9 encounter.

10 The laws adopted by the State of Nebraska serve the
11 compelling interest of protecting kids from online advances of
12 sex offenders who have committed crimes against other kids.
13 It will be shown throughout the course of the next several
14 days provisions in question prohibit law enforcement --
15 provide law enforcement with the necessary tools to apprehend
16 sex offenders quickly.

17 These critical tools have been crafted in a way that does
18 not preclude all use of the Internet by sex offenders but
19 insures the greatest amount of protection is afforded to our
20 children without wrongfully encroaching on plaintiffs' rights.

21 Testimony will be provided at trial which will show how
22 easy it is for the registrants to provide the information
23 required under law.

24 THE COURT: Yeah, but -- but let's take the blog
25 example that I -- I spoke with with counsel. One of their

1 people jumps on Berman's blog and anonymously posts something
2 highly critical of the Attorney General for -- let's say he
3 says, I think Attorney General Bruning is pushing this not
4 because he cares about children but for his own political
5 ends.

6 This offender now has an obligation the next day to
7 inform the highway patrol that he has made that post, right?

8 MS. SPOHN: That he has posted on Berman's -- that he
9 has --

10 THE COURT: He's made a post on -- on Berman. And --
11 and so --

12 MS. SPOHN: And assuming that he's never done that
13 before.

14 THE COURT: I -- I realize that --

15 MS. SPOHN: Okay.

16 THE COURT: -- this is the first time. What possible
17 interest does the State have in knowing that?

18 MS. SPOHN: Again, we're assuming that Berman's blog
19 is one that allows access to children --

20 THE COURT: It's just open.

21 MS. SPOHN: -- or any --

22 THE COURT: It's just an open blog like hundreds of
23 thousands of them are open who don't -- the -- who because of
24 the -- I suppose because of the nature of their blogging
25 efforts they don't care who -- who enters the blog and enters

1 the blog as a...

2 MS. SPOHN: And I'll get -- get to that part of it in
3 a bit, Your Honor.

4 THE COURT: But what --

5 MS. SPOHN: As to -- as to what do we care about it?

6 THE COURT: Yeah.

7 MS. SPOHN: We care because there are a whole host of
8 places where these individuals are -- we don't care about the
9 content of what he said with Berman. What we care about is
10 the places where they're going and -- and seeking out children
11 and --

12 THE COURT: Yeah, but --

13 MS. SPOHN: -- using these blogs to entice -- entice
14 an illegal encounter with a child. We want to know where they
15 are going.

16 THE COURT: You want to know anyplace they go on the
17 Internet in which a child has access, right?

18 MS. SPOHN: Correct, Your Honor.

19 THE COURT: Children are ubiquitous in the real world
20 and the virtual world. Let me give you an example. Let's say
21 that you go to the Presbyterian Church here in Lincoln, and
22 the Presbyterian Church here in Lincoln has a parishioner who
23 commits abortions -- who does abortions, and let's say that
24 you stand on the sidewalk with a graphic picture of an aborted
25 fetus, and the only way little children can get into the

1 Presbyterian Church is to walk by those aborted fetuses, okay?

2 MS. SPOHN: Uh-huh.

3 THE COURT: What restriction can the State impose
4 upon the people who -- who put up these terrifying images to
5 children?

6 MS. SPOHN: I'm not sure I can answer that in the
7 real world, Judge, but I can tell you --

8 THE COURT: That is a real-world case.

9 MS. SPOHN: -- but I can tell you the answer online
10 what the restriction -- what we've done with this law to make
11 sure that it's not a problem for kids, that kids are not on
12 that site.

13 THE COURT: Basically, what you've said is large
14 spaces of the -- of the Internet, just like large spaces of
15 sidewalks around churches, are free from certain activity on
16 the theory that kids are everywhere. No?

17 MS. SPOHN: That's not what we're going to say, Your
18 Honor. When you --

19 THE COURT: No, no, I know you aren't going to say it
20 like that but -- but -- but isn't that basically what you've
21 done? You've said anytime there's going to be a kid
22 potentially in an area, we get to know that you're there --

23 MS. SPOHN: Anytime --

24 THE COURT: -- and we -- we get to know your identity
25 essentially.

1 MS. SPOHN: Anytime you are going to communicate --

2 THE COURT: Sure, holding up a sign that says --

3 MS. SPOHN: We --

4 THE COURT: -- this is -- you're aborting a fetus.

5 That's a communication.

6 MS. SPOHN: The first time that you do so you have to
7 notify -- notify law enforcement that you --

8 THE COURT: So in my -- my real-life example, it
9 would be perfectly okay for the City of Lincoln to say to the
10 guy who holds up the aborted fetus, You are obligated as soon
11 as you do that to go down to the City of Lincoln and tell them
12 your name and your address?

13 MS. SPOHN: If you were a sex offender subject to the
14 crime and that was --

15 THE COURT: No, no, not a sex offender. Just --
16 just -- just because children may be harmed.

17 MS. SPOHN: But -- but the general public is not
18 subject to the laws. Only the -- the only people --

19 THE COURT: No, no, I appreciate that. But -- but it
20 would be okay to do that? It's -- it's -- to require in my
21 example that the person go down and identify himself, anybody
22 who holds up that sign? Because the sign is by definition
23 harmful to children.

24 MS. SPOHN: I'm not sure that it would, Your Honor,
25 be okay, but I'm -- but that's not the situation.

1 THE COURT: And it's not the situation here because
2 we have a -- a previously convicted offender.

3 MS. SPOHN: Correct. Subject to the sexual offender
4 registry provision.

5 THE COURT: Go ahead.

6 MS. SPOHN: We'll also show at trial how the new
7 crime can be complied with in a simple two-step process.

8 THE COURT: And -- and how is that?

9 MS. SPOHN: A sex offender wants to visit a web site.
10 He first has to determine what he wants to do on that web
11 site. If he wants to communicate on that web -- or if he
12 doesn't want to communicate, he simply wants to look at
13 pictures, he wants to read a blog, if he wants to find out
14 what's going on in the news, he's free to do so and he can do
15 so without fear of prosecution.

16 THE COURT: Does he have any obligation to do -- to
17 tell anybody anything?

18 MS. SPOHN: No, not if all -- if he's not
19 communicating. If he's simply looking at the Internet and
20 looking through and reading things, looking at pictures, he's
21 free to do whatever he wants so long as he's not
22 communicating.

23 If he decides he wants to communicate, the very first
24 thing he has to do is go to the terms of use of that web site.
25 He looks at the terms of use. If they say 18 or older or if

1 they're silent, he's free to use that site because under the
2 plain language of the statute, he doesn't have the requisite
3 knowledge, knowing and intentional.

4 THE COURT: What does "access" mean as opposed to
5 "use"?

6 MS. SPOHN: Use -- we would argue that access
7 means -- access is simply looking at the site or if -- acc- --
8 well, access means you're authorized to use the -- let's
9 see --

10 THE COURT: The statute uses "access or use". Why
11 does it use those two terms?

12 MS. SPOHN: Because access is just simply looking at
13 the site. It's -- it's --

14 THE COURT: So any 13-year-old who can access the
15 site, whether they're permitted to use the site, bans the
16 access of the offender; isn't that right?

17 MS. SPOHN: No.

18 THE COURT: Well, read the statute with me.

19 MS. SPOHN: It -- well, it allows access or use to
20 its social networking sites for purposes of -- but when you
21 look at the terms of use, they will say -- and it prohibits
22 the use by sex offenders of those sites.

23 THE COURT: Why does the statute use the word
24 "access"?

25 MS. SPOHN: I'm not sure why it uses "access".

1 THE COURT: "Access" must be different than "use,"
2 wouldn't you agree?

3 MS. SPOHN: It is, Your Honor. Access is simply
4 looking at the site but use would require registration,
5 log-in, actual work on those social networking, instant
6 messaging --

7 THE COURT: Okay. So do you --

8 MS. SPOHN: -- or chat room services.

9 THE COURT: -- agree then if a 13-year-old is
10 prohibited from using the site but can access the site, the
11 site is barred?

12 MS. SPOHN: We would argue, Your Honor, that -- that
13 it should only apply to children that are allowed to use the
14 site under the --

15 THE COURT: Well, then --

16 MS. SPOHN: -- terms of use.

17 THE COURT: -- what does "access" mean? Why is --
18 why is it in there? Do I read it out of the statute? I
19 suppose that's your argument is, Judge, if -- hell, we don't
20 know what it means but you got an obligation, as the Chief
21 Justice just most recently indicated, to read statutes to make
22 them constitutional so read it out. It really just means use
23 and -- and lawyers are stupid. They always use three words
24 when they could use one, sometimes they use two. If you read
25 a contract, what -- what are the contract words? Joint and

1 several and blah, blah, blah. There's always three com- -- or
2 two commas.

3 MS. SPOHN: Yes, Your Honor. I think we would argue
4 that it -- it is only -- it is only use. That -- that if the
5 terms of use express -- expressly authorize children under the
6 age of 18 to use those sites, then someone subject to this
7 law, who's a known convicted sex offender that committed a
8 crime against a child, should not be allowed to use that site.

9 THE COURT: Okay. Why didn't the statute say that?

10 MS. SPOHN: Why does the -- why --

11 THE COURT: Why didn't it say that? We only ban
12 sites in which the written policy of the originator of the
13 site expressly permits children under the age of X to use it.

14 MS. SPOHN: I'm not sure that I know why the statute
15 says "access" -- uses the word "access".

16 THE COURT: No, no. Okay. Forget --

17 MS. SPOHN: But --

18 THE COURT: I jerked you around about that partly to
19 have fun and -- and partly 'cause I'm serious. But let's
20 assume I could fix that. You just gave me a narrowing
21 construction of the statute. Why didn't the statute just --
22 why wasn't the statute itself written that narrowly?

23 MS. SPOHN: I think it is. It says it allows a
24 person who's less than 18 years of age to use its social
25 network web site. I mean --

1 THE COURT: But -- but you just -- you gave me a
2 narrowing instruction, didn't you? That expressly permits in
3 writing in the policy of the entity, right, three things?
4 Now, if the statute was intended to be read that way, why
5 wasn't it written that way?

6 MS. SPOHN: It -- it is, Your Honor, because it says
7 who knowingly and intentionally uses a social networking site,
8 and no sex offender could knowingly and -- have the knowing
9 and intentional intent to use the site if they were -- if it
10 was for any -- if it was -- they don't need to use it
11 expressly because they use the knowingly and intentional, and,
12 again, the statutes are more complicated than they need to be
13 but --

14 THE COURT: Well, look, everybody in the world knows
15 without reading the -- the -- what's the -- what are the
16 sites -- the MySpace --

17 MS. SPOHN: Social network sites?

18 THE COURT: No. What's one? MySpace and what's the
19 other --

20 UNIDENTIFIED MALE SPEAKER: Facebook.

21 MR. DORNAN: Facebook.

22 THE COURT: And Facebook. Everybody in the world
23 knows that kids use that. They don't need to read something,
24 do they?

25 MS. SPOHN: Probably everyone in the world knows that

1 MySpace and -- and Facebook are accessible for teens 13 -- or
2 that kids use it. They may not know in the terms of use
3 it's -- it's 13 and older.

4 THE COURT: No -- okay. That's my point. But
5 couldn't you violate the statute without reading the terms of
6 use? Are you telling me that the next time this thing -- if
7 this is ever prosecuted that Dornan, when he was Douglas
8 County Attorney, is going to have to prove that the
9 perpetrator read the terms of use?

10 MS. SPOHN: No, it'll be -- the terms of use show for
11 the sex offender which sites they're able to use. 'Cause
12 you're right. MySpace and Facebook they might not know.

13 THE COURT: What if he says I didn't -- I just didn't
14 read it? I didn't know.

15 MS. SPOHN: But that's the same with the contract.
16 If you don't know the terms of your contract, then that's no
17 excuse for your being obligated to use the contract. The
18 terms of use are a contract for using that particular site.

19 THE COURT: Knowingly and intentionally? Isn't that
20 what the statute says?

21 MS. SPOHN: It does say -- it does say that, yes,
22 Your Honor.

23 THE COURT: What does "intentional" mean under your
24 construction of that statute unless the person has read it?

25 MS. SPOHN: Or that they, as you have indicated, know

1 by the -- from the whole world that the site is used by
2 children 13 or older. And, honestly, that's a -- that's a
3 prosecutorial case and that doesn't make the statute
4 unconstitutional. It's a question of burden of proof then for
5 the prosecutors going forward.

6 THE COURT: Yeah. With respect -- I'm asking you due
7 process-related questions but go ahead.

8 MS. SPOHN: Fair enough, Your Honor.

9 The purpose of these laws in question is to insure these
10 online venues for children who are most vulnerable and have
11 restricted access for those most like -- for those that are
12 most likely to cause harm. They're easily observed by law
13 enforcement should an imminent risk to a child's safety arise
14 and for these reasons we're asking the Court to uphold the
15 constitutionality of the mandatory disclosure and consent to
16 search provisions of 29-4006 and the new crime which is
17 contained in Nebraska Revised Statute 28-322.05.

18 THE COURT: State of Louisiana lost one of these
19 recently. State of Indiana won one. Are there any other
20 states in which litigation is pending that I should know
21 about?

22 MS. SPOHN: I believe Maryland has litigation pending
23 as well.

24 THE COURT: In the federal court, do you know?

25 MS. SPOHN: I can't say that for sure, Your Honor.

1 I -- I want to say yes but I can't say that for sure.

2 THE COURT: Yeah. And in the Indiana case, that was
3 not -- it looked to me like that was entirely a facial
4 challenge to the statute. Would you agree with that?

5 MS. SPOHN: Yes, Your Honor. As I recall, it was a
6 preliminary injunction hearing that they converted into a full
7 trial on the merits.

8 THE COURT: Well, yeah. But my question is they
9 didn't have a plaintiff talking about his particular situation
10 in the Indiana case. They -- they -- they were talking about
11 plaintiffs all -- everyone. They were looking -- It was a
12 First Amendment challenge only, right?

13 MS. SPOHN: Correct, Your Honor.

14 THE COURT: Not a due process challenge.

15 MS. SPOHN: I don't believe so, Your Honor.

16 THE COURT: All right. You've made your opening
17 statements. It's now about 10 after 12. We got started late.
18 What would you like to do?

19 MR. DAHLQUIST: Your Honor, I think we would like to
20 continue. We have --

21 THE COURT: Oh, sure.

22 MR. DAHLQUIST: Yeah. We -- we have Professor Post
23 here and he's pretty much available today so we would like
24 to --

25 THE COURT: Okay.

1 MR. DAHLQUIST: -- move forward, if possible.

2 THE COURT: My question is do you want to break for
3 lunch?

4 MR. DAHLQUIST: No.

5 THE COURT: Mr. Dornan says no. When is Professor
6 Post's plane?

7 MR. DORNAN: Tomorrow morning, Judge.

8 THE COURT: Okay. Here's what we'll do. We'll go to
9 1 -- we'll go to 1:30 and -- well, no, wait a minute. We do
10 have the law clerks. I'll tell you what. Do you mind if
11 we -- well, I guess I really don't care if you mind.

12 Let's take a -- I have to have a meeting and then let's
13 start again at one o'clock and we'll start again then.

14 Counsel are excused. We stand in recess.

15 (Recess had at 12:11 p.m.)

16 (At 1:02 p.m. on July 16, 2012, the following proceedings
17 were had:)

18 THE COURT: We're back on the record. The plaintiffs
19 may proceed.

20 MS. SPOHN: Your Honor?

21 THE COURT: Yes, uh-huh.

22 MS. SPOHN: Briefly, we'd like to move to sequester
23 the witnesses.

24 THE COURT: Okay. Why? Does it really make that
25 much difference? I mean, I -- I --

1 MS. SPOHN: Not necessarily. Just for the experts is
2 all we're talking about and if...

3 THE COURT: Well, who's going to be your first
4 witness?

5 MR. DAHLQUIST: Well, Professor Post is, Your Honor.

6 THE COURT: So since he's going to testify first, you
7 don't need him to be sequestered, do you?

8 MS. SPOHN: But -- but if ours follows this
9 afternoon.

10 THE COURT: Well --

11 MS. SPOHN: So long as there's not then a need to
12 call him back up to redirect.

13 THE COURT: Oh, I won't sequester -- once he's
14 testified, I won't stop him from listening to your expert's
15 testimony just as if your expert wants to listen to his. That
16 I don't think is appropriate.

17 MS. SPOHN: Okay.

18 THE COURT: The -- Have you all exchanged expert
19 reports?

20 MR. DAHLQUIST: Absolutely, yes.

21 THE COURT: Have you all exchanged expert reports?

22 MS. SPOHN: Yes, Your Honor.

23 THE COURT: Yeah. Here's why I won't. Particularly
24 with the experts in this case. The -- the -- the fear that
25 motivates the typical sequestration order doesn't exist, at

1 least in my opinion. As to the other -- as to fact witnesses
2 or parties, I'm perfectly happy to enter such an order. For
3 example -- well, but as to the experts I'm not going to
4 preclude them from hearing the testimony of each other.

5 Frankly, I think it'd be helpful to make sure the experts
6 can interact with one another so I can have a -- a fulsome
7 understanding of their views so...

8 MS. SPOHN: Okay. Well --

9 THE COURT: What -- what are you concerned about?

10 MS. SPOHN: We didn't necessarily want to have the
11 back and forth in calling the experts up, that -- you know,
12 after we get done testifying having --

13 THE COURT: Well, that's --

14 MS. SPOHN: -- the experts called back up and --

15 THE COURT: -- that's -- that's -- that's really a
16 different question. I'm not much interested in that either
17 but I can handle that in a different way.

18 All right. Counsel.

19 MR. DAHLQUIST: Would you like me to address the
20 motion or proceed, Your Honor?

21 THE COURT: No, you won.

22 MR. DAHLQUIST: Excellent. Best work I ever did,
23 Judge.

24 Your Honor, I'm going to offer what has been marked as
25 Exhibits 101 through 146. These are screen shots of various

1 web sites including the terms of use.

2 THE COURT: Including the terms of use, if any?

3 MR. DAHLQUIST: If any, yes, sir.

4 THE COURT: Okay. Counsel.

5 MS. SPOHN: Your Honor, we'd object on --

6 THE COURT: Relevancy and hearsay.

7 MS. SPOHN: Yes, Your Honor.

8 THE COURT: Overruled. You aren't offering these to
9 prove the truth of the matter asserted, are you?

10 MR. DAHLQUIST: No, we don't -- we don't really
11 particularly care what they say.

12 THE COURT: Well --

13 MR. DAHLQUIST: Well, we do in the sense that they
14 exist but not for the truth of the matter asserted, no.

15 THE COURT: Right. You don't have any -- counsel,
16 you don't have any serious foundational issues with any of
17 these, do you?

18 MS. SPOHN: No.

19 THE COURT: Okay. The objection is overruled. The
20 exhibits are received.

21 MR. DAHLQUIST: Okay. May I approach?

22 THE COURT: Sure.

23 MR. DAHLQUIST: Your Honor, the plaintiffs would call
24 Professor David Post.

25 THE COURT: Professor, if you'll take a seat in the

1 witness stand. Once you're seated there, my court clerk will
2 swear you in.

3 COURTROOM DEPUTY: Please state and spell your name
4 for the record.

5 THE WITNESS: My name is David Post. D-a-v-i-d,
6 P-o-s-t.

7 COURTROOM DEPUTY: Thank you. Please raise your
8 right hand.

9 DAVID POST, PLAINTIFFS' WITNESS, SWORN

10 THE COURT: Counsel, will you pull that microphone
11 close to you. You may inquire.

12 MR. DAHLQUIST: Is that good?

13 THE COURT: That is.

14 MR. DAHLQUIST: Okay.

15 DIRECT EXAMINATION

16 BY MR. DAHLQUIST:

17 Q. Sir, you are Professor David Post?

18 A. Correct.

19 Q. And you are a professor of law at the Beasley School of
20 Law, Temple University?

21 A. Correct.

22 Q. And can you explain to the Court what -- what area you
23 teach in?

24 A. I teach mostly in the area of intellectual property and
25 law of the Internet, sort of cyberlaw, and mostly within --

1 intellectual property's mostly copyright and trademark in
2 addition to this Internet law specialty.

3 Q. How long have you been a professor at Temple?

4 A. Fifteen years. 1997 I began.

5 Q. And how long have you been teaching Internet and
6 cyberlaw?

7 A. Since then actually. Since I started.

8 Q. During your tenure at Temple, have you been -- have you
9 helped publish or authored any publications?

10 A. A number of things. Law journal articles about -- again,
11 mostly about the Internet and the legal ramifications, legal
12 problems on the Internet. So I've published, I don't know,
13 several dozen law review articles. I have a casebook on --
14 it's called *Cyberlaw*, with three other co-authors, West -- a
15 casebook for use in law school classes and I wrote a book on
16 Thomas Jefferson and the Internet. *In Search of Jefferson's*
17 *Moose* it's called for those of you interested. There is a
18 connection between Thomas Jefferson and the -- and the
19 Internet that -- we may not have time to get into that in this
20 testimony.

21 Q. Well, you took away my next question.

22 A. Okay.

23 Q. Could you briefly tell the Court what that book is about?

24 A. Yeah. What -- what that book is about is an attempt to
25 recreate Jefferson -- Jefferson wrote a book -- published a

1 book in his lifetime, *Notes on the State of Virginia*, which
2 was sort of an encyclopedic treatment of Virginia, although
3 Virginia in those days covered a lot more territory than it
4 does today so it really was the entire sort of Appalachian
5 Mountain region.

6 And it went through the natural history and the political
7 history of Virginia through the unusual Jeffersonian
8 perspective on things, and what I tried to do is to recreate
9 that book in effect for cyberspace, for the new world, if you
10 will, so notes on the state of cyberspace as opposed to the
11 state of Virginia. So to go through what Jefferson did for
12 Virginia, think about the things that make it a new place and
13 how communication proceeds, et cetera, et cetera, to do that
14 for -- for the -- for the Internet.

15 Q. And you also said you authored a textbook --

16 A. Correct.

17 Q. -- a hornbook?

18 A. Right.

19 Q. And what was the name of that?

20 A. It's called *Cyberlaw: Problems in Juris Prudence and the*
21 *Policy in the Information Age*. It's a fairly typical law
22 school casebook. It has lots of excerpted materials from
23 cases and treaties and statutes and -- with explanatory
24 materials from me and from the other -- my co-authors.

25 Q. And did you author any particular portion of that

1 textbook?

2 A. Yeah, I did. There are some -- I think it has 12
3 chapters and I was responsible for maybe two or three of them.
4 I think I did the chapter on domain names and trademark law.
5 I think I did the chapter on copyright -- copyright law and
6 the chapter on juris- -- on jurisdiction, Internet juris- --
7 personal and subject matter jurisdiction on the Net.

8 Q. I presume you went to postsecondary education somewhere?

9 A. I did, yeah.

10 Q. And can you --

11 A. Loads of it.

12 Q. -- explain to the Court your educational background?

13 A. Yes. I have a -- I have a Ph.D. in anthropology I got in
14 1978 from Yale. I went to law school at Georgetown. I have
15 my J.D. from Georgetown in 1987 -- '86 or '87. I'm sorry, I'm
16 blanking out on that.

17 Q. And following graduation from Georgetown, where -- where
18 did you go from there?

19 A. I went -- from Georgetown I clerked for Judge Ruth
20 Ginsburg, who was then on the -- a judge on the D.C. Circuit
21 Court of Appeals. I did that for one year, '86 to '87. I
22 worked at Wilmer, Cutler and Pickering for about
23 six-and-a-half years, a large Washington, D.C. multipurpose
24 law firm. I practiced mostly in the intellectual property and
25 sort of high-tech transactions group.

1 Then I went back actually to clerk for now Justice
2 Ginsburg who had been appointed to the Supreme Court in -- in
3 the 1993 term. After that year I went to George- -- back to
4 Georgetown to teach for three years. I was a visiting
5 professor at Georgetown and then 1997 I went off to Temple.

6 Q. How did you first get involved in the Internet or
7 Internet law?

8 A. It was actually during my years of practice. We had a
9 small group at the law firm of which I was a part that was
10 doing as I said sort of high-tech transactions. We had a
11 number of clients, software developers and systems integrators
12 and the like, and this was the late 1980s.

13 The Internet was just beginning to become a commercially
14 significant -- just beginning to become commercially
15 significant around '89 -- 1989, 1990, and some of our clients
16 were involved in it just because they were in that world, a
17 sort of high-tech world.

18 The partner who was in charge of that little group I was
19 in was very forward-looking. I think he realized --
20 recognized that the Internet -- way before most people
21 did that the Internet was something important as a
22 communications medium, and so we got talking and -- and
23 writing about it fairly early on, 19- -- in the early 1990s.

24 Q. Have you ever served as an expert witness in any
25 litigation prior to this one?

1 A. Yes, I have.

2 Q. And what cases were those?

3 A. Okay. I gave you a list. There were three or four.
4 There was a trademark action in federal court last year,
5 *Warden vs. Falk*, I believe, involving a application of
6 trademark law principles to person names.

7 There was a copyright -- I'm trying to remember the exact
8 name of the case. I'm sorry, I'm blanking on it. But a
9 copyright -- it was a copyright malpractice action. I was
10 called in as a witness -- expert witness on the duties of a
11 lawyer who's handling a copyright-related matter and what --
12 the reasonable standard of care.

13 There was another case involving again a copyright
14 infringement case, a question about the copyrightability of
15 certain plans and systems and programs for local hospitals in
16 Philadelphia. I think that's -- I think that's it.

17 Or there was an early copy- -- another copyright
18 infringement action about jewelry -- a copyrightability of
19 jewelry designs. I was called in for -- on plaintiff's behalf
20 on that case.

21 Q. And you were provided a number of materials to review and
22 you reviewed those materials?

23 A. Yes.

24 Q. And what were those?

25 A. Materials I reviewed for this?

1 Q. For this case, yes, sir.

2 A. The statutory -- the Nebraska statutes, the original
3 memorandum and order that the -- the judge issued, the
4 defendants' expert report. I think that's it, what I was --
5 was supplied. I reviewed a number of other things in
6 preparation of my report. Textbooks about Internet
7 engineering, among other things.

8 I reviewed the web sites that I listed in the -- in the
9 appendix of the report and I did some work on the -- on the
10 Internet to try to elucidate what the statutory terms meant
11 but I don't think there was any other material that -- that
12 you supplied to me other than that.

13 MR. DAHLQUIST: Your Honor, may I approach, please?

14 BY MR. DAHLQUIST:

15 Q. Sir, I'm handing you what is marked as Exhibit 304.
16 Could you identify that document?

17 A. Yes. That is the expert report I prepared and provided
18 to you back in December of 2010.

19 Q. And that is as a result of your reviewing the materials
20 that you testified to here today?

21 A. Correct.

22 Q. And at the back at the end, is there a copy of your
23 resume attached to this?

24 A. Yes.

25 Q. And is that an accurate depiction of your resume, sir?

1 A. Yes. There are a couple of additional things since
2 December of 2010 that I published, some smaller things, but
3 this is an accurate reflection of my background.

4 MR. DAHLQUIST: Your Honor, I'm going to offer what's
5 been marked as Exhibit 304 and I would move to certify
6 Professor Post as an expert in Internet law and its
7 application.

8 THE COURT: Well, let's take up Exhibit 304 first.
9 Is there any objection?

10 MR. GRIESS: No, Your Honor.

11 THE COURT: It's received. I don't typically accept
12 or reject experts on a tender. You've laid a sufficient
13 foundation. You may proceed. I'll leave it up to you.

14 MR. DAHLQUIST: Fair enough. Thank you, Judge.

15 THE COURT: Certain places they do that. Certain
16 places they don't. This is one of the places they don't. If
17 you want to know my reasoning, if a jury was here and I was
18 asked to do that, the jury might think what I said was
19 important and, frankly, it isn't. The preliminary
20 determination -- I think you've laid enough to satisfy me that
21 the professor can talk about Inter- -- Internet law
22 (inaudible) but let's take it by a question-by-question basis.

23 For example, if we got into a coding question, I don't
24 know that the -- the professor would -- maybe he is -- could
25 tell us about coding but right now I don't know that so that's

1 why I do it.

2 Go ahead.

3 MR. DAHLQUIST: Okay. Thank you.

4 THE COURT: Uh-huh.

5 BY MR. DAHLQUIST:

6 Q. Sir, have you formed an opinion about the application of
7 Nebraska Revised Statute 28-322.05 as it relates to the
8 Internet and its -- its scope?

9 A. A number of opinions about that, yes.

10 Q. And what are those opinions?

11 A. You want -- Generally speaking, that the -- the
12 definitions in the statute, chat room, instant messaging
13 service and social networking web site, are -- to the extent I
14 can understand what they mean, they either cover vast --
15 almost unknowable vast universe of material that is available
16 on the Internet and -- and would prohibit access and use to
17 almost everything on the Net, or if interpreted slightly
18 differently, it's difficult to know because some of the
19 language is ambiguous, I think.

20 If interpreted differently, might cover virtually nothing
21 on the Internet. It's sort of an either/or problem that I
22 think the -- the -- the statute -- statute presents. I'm not
23 sure either of those alternatives is quite what the
24 legislature had intended but the -- the language is
25 susceptible to -- to two different interpretations.

1 Q. Well, I want to focus a little bit -- And do you have a
2 copy of the statute sitting in front of you?

3 A. I actually do if I'm allowed to -- this is just -- I
4 don't know if you want me to --

5 THE COURT: No, sir. That's fine.

6 A. Just -- it's a copy of the relevant definitional sections
7 in the statute from my -- from my notes.

8 MS. SPOHN: And Your Honor?

9 THE COURT: Sure.

10 MS. SPOHN: Just -- sorry to interrupt.

11 THE COURT: Sure.

12 MS. SPOHN: You do have a notebook in front of you
13 that has the statutes in question on them -- on -- on your
14 desk if -- if at all you want to look at those.

15 THE COURT: Yes. Thank you very much.

16 Go ahead.

17 MR. DAHLQUIST: Your Honor, I'm going to -- if I
18 could, could I approach and put a copy of the statute up on
19 the ELMO? ELMO.

20 THE COURT: Sure.

21 MR. DAHLQUIST: Thank you.

22 THE COURT: Professor, are you seeing that on your
23 screen?

24 THE WITNESS: No. On this...

25 THE COURT: The courtroom deputy will assist you,

1 sir.

2 THE WITNESS: Thank you.

3 THE COURT: Are you getting it, Jan?

4 THE WITNESS: Ah, something happened. It's still --
5 it flashed for a minute but it's still saying out of range.
6 Same message (unintelligible) blue.

7 THE COURT: Let's do this rather than spend our time
8 worrying about that. Let's take the -- the big flat screen
9 and turn it --

10 THE WITNESS: So I can see it.

11 THE COURT: -- so the professor can see it.

12 THE WITNESS: That'd be great. Thank you.

13 UNIDENTIFIED FEMALE VOICE: Are you able to see it?

14 THE WITNESS: Yes, I am. Thank you.

15 THE COURT: That way the professor is -- cannot see
16 Mr. Monaghan which is a good thing.

17 MR. MONAGHAN: Can -- can I move over here in
18 (unintelligible) this afternoon?

19 THE WITNESS: That's very good. It's killing --
20 killing two birds as it were.

21 THE COURT: That -- that -- that's right.

22 Go ahead.

23 BY MR. DAHLQUIST:

24 Q. Sir, I want to focus your attention to the screen and
25 specifically this is 28-322.05 and you reviewed this --

1 A. Yes, I did.

2 Q. It talks about a prohibition by an individual -- and I'm
3 kind of paraphrasing here. I want to get to the -- the part
4 of it -- who knowingly and intentionally uses a particular
5 medium --

6 A. Right.

7 Q. -- and we'll come back to those mediums -- that allows a
8 person who's less than 18 years of age to access or use its
9 particular medium.

10 A. Right.

11 Q. So I want to talk about the phrase "that allows a person
12 who's less than eighteen years of age to access or use." What
13 is your understanding of the Internet and its working as far
14 as is there any prohibition for any medium as far as access
15 goes?

16 A. As far as access goes, it's difficult for me to think of
17 a social networking web site, instant messaging service or
18 chat room service that does not allow persons who are under
19 the age of 18 to access the service or the site. There's no
20 effective prohibition against someone who's under the age of
21 18 from using -- from accessing a instant messaging service.
22 For example, I don't know of any instant messaging services
23 that even purport to keep minors out. Same for chat rooms.

24 And in terms of accessing a social network service, even
25 though -- even those that may have in their terms and

1 conditions something that says you may not use this service if
2 you are less than 17 years old or 18 years old, the access to
3 those sites is possible if only to read the terms and
4 conditions. So a 13-year-old can access any social networking
5 site on the Internet as far as I'm aware.

6 Q. So, in other words, is it your opinion that all social
7 networking web sites -- and we'll come back to what that
8 means -- but all social networking web sites allow access to a
9 person who is less than 18 years of age?

10 A. I think that's correct, yeah. I think that's right.

11 Q. And would that also --

12 A. Again, if -- if only to access the page that discusses
13 the terms and conditions of use which may themselves say you
14 can't use the service if you are under age but the access to
15 the site is -- is available to anyone irrespective of their
16 age.

17 Q. Would that also be your opinion as it relates to instant
18 messaging and chat room service? And, again, we'll come back
19 to what those mean but...

20 A. Yes. And -- and if -- if anything, my opinion is that
21 it's -- the -- the 18-year-old clause is even less effective
22 or less meaningful in a sense with respect to instant
23 messaging services because I'm not aware of any instant
24 messaging services that in their terms and conditions would
25 prohibit someone from using the instant messaging site --

1 service so -- so in that sense the same idea applies. That
2 persons who are under the age of 18 can access all instant
3 messaging services, all chat rooms and all social networking
4 services more or less.

5 Q. And how would -- and this might be a very basic question
6 but how would someone who was under 18 access a social
7 networking web site?

8 A. Oh. Log -- go to www.facebook.com and you are now
9 accessing a site that I think clearly falls within the
10 defin- -- the statutory definition of a social networking
11 site, and www.facebook.com is a publicly accessible site that
12 anyone with access to the Internet can -- 13-year-old,
13 9-year-old can -- can get access to that site even before they
14 have -- whether or not they can join, they can log in and
15 register and do various things on that site is a separate
16 question that we can get to but in terms of -- that's
17 accessing the main Facebook page that I think would qualify as
18 access to a social networking site.

19 Q. And then would that --

20 A. And anyone who's under the age of 18 can -- can use that
21 if they can use the Internet, if they can type and all those
22 things.

23 Q. Would that also allow access -- as you mentioned before,
24 that would allow access to the terms of -- terms of use or
25 terms of service, whatever that --

1 A. Correct.

2 Q. -- might be?

3 A. On the Facebook.com -- on that page that you get to, if
4 you go to Facebook.com, there'll be something at the bottom
5 that -- typically that says legal notices or terms of use or
6 copyright violations. There'll be links to other pages
7 that -- that will show you things like the terms and
8 conditions of service and that too is open whether or not you
9 are a Facebook account holder.

10 They don't even ask at that point are you over the age of
11 17 or -- or something when they -- when they allow people
12 to -- to access that. That's -- that's publicly available
13 information to anyone who clicks on the right part of the
14 page.

15 Q. I want to shift just a little bit now and turn to the
16 term "use". So same phrase but now focus on the word "use".

17 A. Uh-huh.

18 Q. Would you agree that a statute only permits use when the
19 terms of service limit that use to a particular age group, in
20 this case, someone who's over the age of 18?

21 A. I'm not -- not sure I quite understand the question.

22 Q. Would you agree that there's only individuals over the
23 age of 18 using a social networking web site if the terms of
24 use say you can only use this if you're over the age of 18?

25 A. I -- I think my answer is no to that question. That --

1 that many -- I think it's well-known among those who spend
2 time on the Internet that sites may have prohibitions -- many
3 kinds of prohibitions in their terms of service, including an
4 age limitation, that are both unenforced and probably
5 unenforceable, that they can't really tell.

6 They may say you may not use this site -- do not enter
7 this site unless you are over the age of 18 but, in fact, if
8 you then go and attempt to enter the site, there's no way that
9 they can tell at that point whether or not you are over the
10 age of 18. So you can gain entry to it even if that is -- as
11 a practical matter, you can gain entry to most of those sites
12 like Facebook, which does have an age limitation, I believe
13 it's 13 on Facebook, but a 12-year-old can get access to --
14 can get access to Facebook and can use Facebook even though
15 that is in violation of the stated terms and conditions.

16 Q. So, in other words, in your opinion would -- in that
17 situation Facebook allows an individual under the age of its
18 stated terms to use its web site?

19 A. I think that's -- that's right. I think that is at least
20 a perfectly plausible reading of -- of the statutory language.
21 That it allows -- if -- there may be a sign -- as we drove by
22 the football stadium today. There may be a sign at the
23 doorway of the football stadium that says you may not enter if
24 you're under the age of 12, may -- but if -- if they don't
25 check anyone's age when they come in and if there are 7,000

1 people under the age of 12 at a football game, I would regard
2 that as that the stadium allows people who are under the age
3 of 12 to enter because there they are. There are thousands of
4 them in there.

5 And I think the same is true for most -- for most
6 Internet sites. There are sites that use -- the most frequent
7 proxy that's used for age identification on the Net is a
8 credit card. There are some sites, particularly prevalent
9 amongst sort of adult -- adult sites, hard core pornographic
10 sites, that will, in fact, not let you enter unless you put in
11 a credit card number on the reasonable assumption that most
12 people who are underage don't have access to credit cards and
13 so that's -- that's -- that's a different category.

14 That's a small category of web sites that do that but the
15 vast majority of sites that fall under the category social
16 networking sites in the statute have -- whatever they may say
17 in their terms and conditions, they have no enforcement
18 mechanisms at all to keep people who are underage from using
19 that site. So I would regard that as allowing people who are
20 under the age of 18 too.

21 MR. GRIESS: Your Honor, I would object to the
22 defendant's *[sic]* answer. I don't think the foundation has
23 been established to establish his credentials in regard to his
24 answer.

25 THE COURT: What foundation is lacking?

1 MR. GRIESS: His knowledge of Facebook policies and
2 instant messaging service policies and the like.

3 THE COURT: Overruled. Go ahead.

4 MR. DAHLQUIST: Thank you, Your Honor.

5 BY MR. DAHLQUIST:

6 Q. I said we'd come back to those some things, those three
7 mediums. I'd like to turn now to the way those three mediums
8 have been defined.

9 MR. DAHLQUIST: And I -- if I could, Judge, can I
10 approach and change the --

11 THE COURT: Uh-huh.

12 MR. DAHLQUIST: -- ELMO?

13 THE COURT: Yes.

14 BY MR. DAHLQUIST:

15 Q. Now, one of those three mediums would be chat room,
16 correct?

17 A. Correct.

18 Q. How -- and you reviewed the Section 29-4001.01,
19 subsection 3?

20 A. Yes.

21 Q. And what is your opinion on the -- on how this subsection
22 3 would be applied to the Internet and -- and can you describe
23 some of the general types of services that would be included
24 in the -- the definition?

25 A. Yes. The first problem I think in this statutory

1 language is -- is -- is that it talks about a chat room
2 means -- one can read this statutory section as follows: Chat
3 room means a communication network primarily designated for
4 the instantaneous exchange of text or voice transmissions or
5 computer file attachments among two or more electronic
6 communication device users.

7 If -- if that's how it's read, it covers -- the ordinary
8 telephone service, for example, is a communication service
9 that allows virtually instantaneous exchange of voice among
10 electronic communication users. So the ordinary telephone
11 system. The cellular telephone system I think could fall
12 under this definition and all systems of which I am aware that
13 call themselves instant messaging. SMS systems, text --
14 texting systems also allow the virtually instantaneous
15 exchange of text amongst two or more computers or electronic
16 communication device users.

17 That's the -- I think a broad reading of this statute --
18 statutory section taking out -- there's -- there's no comma.
19 I need -- I need a comma to tell me how to read this, whether
20 communications network stands on its own or not.

21 If it doesn't, then a chat room means server space on a
22 communication network that is primarily designated, etc. I
23 think there again when you or I communicate by electronic
24 mail -- ordinary e-mail service I think would be
25 encompassed -- clearly encompassed by this definition of chat

1 room. There is server space that is dedicated to our
2 instantaneous -- virtually instantaneous exchange of text.
3 That server space may be on the Internet or it may be on some
4 other communications network but there is a little piece of
5 storage somewhere on the Gmail server, for example, if we use
6 the Gmail electronic mail system.

7 So we are now participating -- when I send you an
8 e-mail -- an ordinary electronic mail with text and maybe a
9 file attachment, I think as a perfectly reasonable reading of
10 the statute that we are now engaged in a chat room interaction
11 because there's server space on the Internet that is
12 designated for the instantaneous exchange of texts amongst the
13 two of us.

14 Q. Would this also encompass what are kind of the more
15 conventionally thought of chat rooms?

16 A. Yes, it would. So there'd be ordinary -- what -- what I
17 think of as the ordinary -- the -- the term "chat room" arose
18 and still used to designate -- it arose in the 1990s. America
19 Online had specially designated "places" -- they're not really
20 places, they're just server space where -- that simulated a
21 room where people could enter, leave messages, other people
22 could participate in the conversation.

23 I think those -- and there are still many such places on
24 the Internet that have that functionality. I think that's
25 clearly within the bull's-eye as it were of this statutory

1 definition in addition to this broader reading that it
2 encompasses text, instant messaging communication, e-mail
3 communications, etc.

4 Q. What other types of services could fall under this?
5 Would there be commercial web sites or portions of commercial
6 web sites that could be encompassed under the definition of
7 chat room?

8 A. Yes. Amazon.com, a familiar shopping web site, has -- is
9 a web site. It has server space that is designated for the
10 instantaneous exchange of text between two or more computer
11 users. I can send you -- I can find your -- if you're a
12 registered Amazon user and you've listed -- you've written a
13 review of my book, I can instantaneously communicate with you
14 using the Amazon system. I think that qualifies as a chat
15 room in -- under -- under this definition. And there are lots
16 of commercial sites like that that allow the instantaneous
17 communication.

18 Q. When you say there's lots of commercial sites, you've
19 studied the Internet, correct?

20 A. I have, yeah.

21 Q. And you use the Internet, correct?

22 A. I do, yeah.

23 Q. And you teach Internet law --

24 A. I do.

25 Q. -- correct?

1 Could you provide some -- and this might be a no but
2 could you provide some estimation of the scope that chat room
3 as written would be applied to just commercial web sites?

4 MR. GRIESS: Objection, foundation.

5 THE COURT: What foundation is lacking?

6 BY MR. DAHLQUIST:

7 Q. You have used the Internet over the course of your
8 career?

9 THE COURT: (Unintelligible.)

10 MR. DAHLQUIST: Oh, I'm sorry. Oh, I thought you --

11 THE COURT: I had --

12 MR. DAHLQUIST: -- ruled on that. I'm sorry. I
13 thought you were telling me foundation was lacking. I was
14 going to --

15 MR. GRIESS: That's what I thought too, Your Honor.
16 I...

17 THE COURT: Okay. Well, then let's start -- start
18 over. There was a question, there was an objection as to
19 foundation. Foundation can be as broad as a bread basket or
20 narrow as a pin. I typically say if you don't -- aren't
21 specific with me what foundation is lacking. That's what I
22 asked counsel. That flummoxed counsel. He paused. That
23 flummoxed you too. You went forward with the question. So
24 we're going to go back to counsel and he's going to answer my
25 question.

1 MR. GRIESS: Again, Your Honor, I don't think that
2 the foundation regarding the professor's experiencing --
3 experience surfing the Internet, his -- his knowledge of all
4 of the Internet web sites that are out there has been
5 established.

6 THE COURT: Okay. Why don't you be specific? What
7 would you like to know? How many times he was on the
8 Internet? Would that be enough? If he was on it 10,000
9 times, would that be okay? I mean, is that the sort of thing
10 you want to know?

11 MR. GRIESS: I don't think there's a bright line to
12 be drawn anywhere.

13 THE COURT: No. I'm -- I'm being specific with you
14 because I want to know what you think is lacking. What do
15 you -- what foundation would he need in order to be able to
16 answer that question? If you -- if you were preparing him, if
17 he were your expert and -- and -- and you were paying his
18 exorbitant fee, what -- pardon me, Professor, I'm teasing
19 you -- what would -- what would you want him to know?

20 MR. GRIESS: Well, Your Honor, I -- I would want more
21 assurance that -- that the professor knows every corner of the
22 Internet and -- and his experience using the Internet and --
23 and teaching it to his students and -- and --

24 THE COURT: You don't think the fact that West
25 decided that he was good enough to publish his casebook and

1 he's taught it for 17 years and he's got a Ph.D. in another
2 discipline, that would suggest to you that he knows how to do
3 original research? You don't think those things are enough?

4 MR. GRIESS: No, Your Honor.

5 THE COURT: Okay. But you don't want to tell me what
6 is enough?

7 MR. GRIESS: I -- I've explained it as best as I can,
8 I think.

9 THE COURT: Overruled. Go ahead.

10 THE WITNESS: I can't remember the question. I'm
11 sorry.

12 BY MR. DAHLQUIST:

13 Q. I'll -- I'll go back to the question. I think...

14 In your experience do most, if not all, commercial web
15 sites -- and by commercial web sites I mean web sites operated
16 by businesses -- do they allow or permit some functionality
17 that falls within the definition of chat room?

18 A. Yes. If only to allow -- I mean, again, I don't know
19 every corner of the Internet and I have not seen all
20 commercial web sites. Obviously, there are hundreds of
21 millions of them but my experience has been that a large
22 proportion of them at least allow communication -- there's
23 space on the site, there's functionality on the site that
24 allows me as a user to communicate with the web site operator,
25 for instance. Maybe the web master's only the person who's

1 actually responsible for the site and/or the customer service
2 at the -- you know, say leave a comment here or if you have a
3 problem, click here and it sends off what is equivalent to an
4 electronic mail message so someone in the customer service
5 department.

6 My experience is that millions -- I think it is safe to
7 say millions of sites have that functionality and would
8 therefore fall -- ordinary business sites that may be selling
9 eyeglasses or shoes or books or whatever have that
10 functionality and would therefore fall within the chat room
11 definition as I read it.

12 Q. And it's also your opinion that this would include cell
13 phone usage and landline usage; would that be fair?

14 A. Again, depending upon which I think is -- is an ambiguity
15 in the -- in the way the statute is -- is written. If I can
16 read this, as I think I -- I think I can, as follows: Chat
17 room means a dot, dot, dot communication network primarily
18 designated for the virtually instantaneous exchange of text or
19 voice transmissions, et cetera, then I believe that covers all
20 of the cell phone networks I'm aware of, all of the landline
21 networks that I'm aware of.

22 If it's restrictive to the alternate reading which puts a
23 comma in -- after server space, I guess, it means it's a web
24 site or server space, it's on the Internet or another
25 communications network, and it has this functionality. I -- I

1 think it's -- it's a little bit of a stretch at that point to
2 say that ordinary telephone service, which would fall under
3 the definition under reading one -- I think it's a little bit
4 of a stretch to say that ordinary telephones -- because
5 there's now not a web site or server space in the ordinary but
6 many cell phone networks would qualify, many instant messaging
7 services would qualify.

8 To the extent I just sent off an -- a text message with a
9 file attachment to a friend of mine over lunch, there's a
10 little piece of server space on a communications network that
11 is designated to -- for our communication back and forth
12 between two electronic communication device users. I think
13 that's a statutory chat room. It's not a chat room in the
14 ordinary sense of the term but it is a chat room under this --
15 under this definition.

16 Q. I want to turn to subsection 10. And you reviewed this
17 subsection as part of preparing -- preparing for your
18 testimony?

19 A. Yes, I did.

20 Q. And did you come to a conclusion or do you have an
21 opinion, rather, as to the scope of those services that are
22 encompassed within the definition of instant messaging?

23 A. Yes, I do.

24 Q. And what is that opinion?

25 A. Once again I -- I -- I think there's a very serious and

1 substantive ambiguity in the language. Direct and dedicated
2 communication services are not well-defined terms. If by
3 dedicated -- a dedicated communication service -- one reading
4 of dedicated would mean that you or I have -- there's actually
5 a line of a physical piece of wire that is dedicated to our
6 communication, you and I let us say. That is the way that the
7 telephone system actually works.

8 The old-fashioned landline system actually dedicates
9 space on the -- on the wires for our communication. If -- if
10 we call each other -- if I call you on a landline system,
11 there'll be a line dedicated to that for the duration of the
12 call.

13 If that's -- that's not how in most Internet
14 communications -- not -- or any Internet communication works.
15 It doesn't dedicate space in that way and most cell phone and
16 instant messaging systems don't dedicate it in this way. So
17 if that's what the legislature meant by "dedicated," then it
18 would only cover landline service which I can't believe was --
19 I don't think was what they meant by this.

20 If they're talking a little more broadly about dedicated
21 and private, that is, communications that's not publicly
22 accessible but is only accessible to the participants in
23 the -- in the communication, then I think it covers everything
24 meaning all Internet communication, all e-mail, all text
25 messaging is a private -- it's a direct -- when I send you a

1 text, it's a direct, private communication service accessed
2 with an electronic communications device that allows us to
3 instantaneously transmit texts and computer file attachments
4 to other users.

5 So either this term "dedicated" has this sort of
6 specialized meaning which would narrow it only to the
7 old-fashioned telephone system which I don't believe is what
8 the legislature intended or it -- it is just referring to
9 private communications systems of the ordinary kind that we
10 use every day, electronic mail and texting and voice
11 communication and Internet communication through -- mediated
12 through web sites and all the rest.

13 So it covers an enormous swath of -- of elec- -- all
14 elec- -- virtually all electronic communication I think would
15 fall under this definition of instant messaging.

16 Q. Can you provide some of the more popular services that
17 you believe fall within the definition of instant messaging
18 system?

19 A. Sure. Well, Google. Certainly, the Gmail system is an
20 instant messaging system. But Hotmail is an instant messaging
21 system. It's private. It allows a direct private
22 communication between you and I, sending and receiving texts
23 and computer file attachments to other selected users of the
24 service.

25 So those -- Facebook is clearly an instant messaging

1 service that allows the same thing. Messenger -- Yahoo
2 Messenger is an instant messaging service. I suppose even
3 sites that are primarily information-oriented sites like
4 Wikipedia. I can communicate with other users of Wikipedia
5 directly. I can click on their name -- if they're registered
6 users, I can click on their name and I can send them a message
7 directly and privately so I suppose that's an instant
8 messaging service as well.

9 YouTube is an instant messaging service I think for the
10 same reason. I can -- if I go to a video, there'll be a
11 little box that says who posted this video and if they're a
12 registered user, I can click on their name and I can
13 communicate with them. I can leave a comment to them. I can
14 find their e-mail address and send them an e-mail. I think
15 all of that makes this an instant messaging system because it
16 allows virtual instantaneous transfer of texts and computer
17 file attachments.

18 Q. And, again -- well, we'll move on.

19 I want to move on to subsection 13.

20 A. Is it social networking?

21 Q. Yeah. And you reviewed this subsection in preparation
22 for your expert report --

23 A. Yes --

24 Q. -- and testimony?

25 A. -- I did.

1 Q. And did you come to a conclusion or form an opinion,
2 rather, as to the scope with which this definition would be
3 applied to the Internet?

4 A. Yes.

5 Q. And what is that opinion?

6 A. Once again, there's a potentially serious -- some
7 threshold statutory ambiguity that has to be resolved before
8 one can make sense of this definition and -- and in this
9 definition it refers to this collection of web site language.
10 The -- the statute says a social networking web site means a
11 web page or a collection of web sites that has certain
12 functionality.

13 The functionality itself is mostly -- is to create a
14 profile -- searchable profile. If I can create a searchable
15 profile that others can comment on or communicate with me,
16 they can find my profile and send me a message of some kind,
17 then it has the -- the substance that is -- is listed here.

18 And then the question becomes am I at a web page that is
19 part of a collection of sites that has that functionality.

20 "Collection of web sites" is just not a well-defined term in
21 the industry. I'm prepared to say I think it's -- it could be
22 Internet itself. This definition could cover everything that
23 is on the World Wide Web because the World Wide Web is itself
24 a collection of web sites. That is what it is.

25 Some of them have this functionality so one reading of

1 this statute is -- is -- is just colossally broad which would
2 just say anytime I'm at any web page, I'm at a -- one, I'm
3 at -- at one of a collection of web sites, the Internet, that
4 allows -- that -- that possesses this functionality. So that
5 would cover literally every one of the 840 million or however
6 many there are pages out there on the Net because of -- it's
7 in the collection of web sites.

8 Even if you take that definition, read it a little more
9 narrowly, you still have things like Google.com.

10 Google.com -- you type in Google.com to your browser and it
11 comes up with a search page, the familiar page. That page
12 doesn't have profile information on it. I can't enter my
13 profile on that page but I can enter a pro- -- searchable
14 profile on any number of pages that are linked to the Google
15 web page so I can go from the Google.com page to Blogger, to
16 Gmail, to YouTube, those -- and in one click I'm at a site
17 where I can have a searchable profile that viewers can access.

18 So then the statutory question becomes is Google.com --
19 even though it does not have this functionality, is it part of
20 a collection of web sites that has this functionality, and I
21 think the answer is, yeah, it is because it's so -- the
22 statutory ambiguity leaves -- it's not easy to make a law
23 professor speechless but -- but it's difficult to know even
24 why -- I know that they're in the same collection of web
25 sites. Blogger is owned by Google so I suppose that makes it

1 part of the same collection. It's one link away from Google
2 so it's part of a collection. Google encourages you -- the
3 Google.com site encourages you to go to Blogger, to go to
4 YouTube.

5 So I think it's -- to me as a user, I'm -- when I'm at
6 the Google.com page, I'm at -- I'm in a collection of web
7 sites that has this functionality so the Google.com page is a
8 social networking web site. Even though it does not have this
9 functionality, it's part of the collection that does.

10 So that's one opinion that I came to is that the
11 collection of -- the collection of web site language broadens
12 this definition out to cover a -- a -- just a vast array of --
13 of sites that I'm not sure was in the legislature's vision
14 when they passed the statute but -- but is in the -- is in the
15 language.

16 I guess the -- the second opinion I have is that even
17 take -- putting that aside -- or to excise that language, the
18 number of web sites -- forgetting the collection issue, the
19 number of web sites that have this functionality I think is
20 much broader than what we would ordinary *[sic]* call social
21 networking -- the ordinary social networking site.

22 The paradigm social networking site is something like
23 Facebook or MySpace, but this definition would clearly again
24 include many, many commercial sites that wouldn't ordinarily
25 think of themselves as social networking but they have this

1 functionality. Amazon has this functionality, for example.
2 L.L.Bean has this functionality. You can put a profile in,
3 tell the world who you are. You can leave reviews under your
4 assumed name. Because you have a profile, you're a registered
5 user, people can click on your name and see where you're from.
6 They can see if you have a e-mail address if you've chosen to
7 leave that e-mail address. They can see if you have a web
8 site if you've chosen to leave that.

9 Lots of commercial sites, not all but many, a large
10 proportion of them, allow people to post searchable profiles
11 and to communicate one-on-one with other users because they
12 see that as a way to generate traffic to the site and to form
13 some sort of a community so people get to know one another and
14 they have discussions amongst themselves and that too
15 generates traffic to the web site. So this is very common
16 from -- even putting aside the ambiguity of the collection of
17 web sites.

18 I don't think Amazon.com thinks of itself -- people who
19 run Amazon.com think of themselves as running a social
20 networking site but under this definition they clearly are or
21 L.L.Bean for -- for that matter or lots of these -- Archived
22 Music that lets you buy CD's but also has a way for you to
23 post your profile and talk to other users.

24 That's what this -- is encompassed by the statutory
25 definition and I think it has an enormous -- covers a great

1 swath of ordinary commercial web sites that are out there.

2 Not to mention things, of course, like blogging sites
3 that are -- Blogspot and WordPress and those which also allow
4 you to have a searchable profile that can be accessed by other
5 members and that -- where the members can communicate with one
6 another. I think those are also all encompassed by even a
7 narrow definition of "social networking web site" and -- under
8 this statute.

9 Q. So is it fair to say you think there's an ambiguity in
10 each of these three definitions?

11 A. I do.

12 Q. An ambiguity that requires -- well, let me step back. If
13 you were to read these statutes unambiguously, it seems that
14 you're saying this includes all of the Internet, all cell
15 phone use, all landline use and virtually all electronic
16 communication?

17 A. I think that's -- that's right. That is a reasonable
18 reading of the unambiguous language of this statute is that it
19 covers virtually the entire universe of electronic
20 communication.

21 Q. I want to step back to the criminal statute -- now that
22 we've kind of gone through the definitions step back to
23 28-322.05.

24 A. Uh-huh.

25 Q. So, Professor, it's your opinion that this language does

1 not provide unambiguously for any age limitation; is that
2 correct?

3 A. Well, I mean, the -- the statutory --

4 Q. Let me --

5 A. -- provision has the 18 years of age.

6 Q. Well, let me rephrase this.

7 A. Is that what you meant? Yeah.

8 Q. Let me rephrase this.

9 A. Sorry.

10 Q. Unambiguously, the way the statutory age limit is written
11 does not provide for any real --

12 A. Limitation.

13 Q. -- or effective age limitation --

14 A. Correct.

15 Q. -- at all?

16 A. In other words, if -- if -- as we just said, if social
17 networking web site, instant messaging site, chat room service
18 have these enormously broad definitions, the criminal
19 provision here does limit the penalties you -- only to those
20 that -- those social networking sites, instant messaging
21 services, chat room services that allow persons who are less
22 than 18 years of age to access or use them but that limitation
23 is virtually meaningless.

24 That -- that -- that eliminates -- out of this vast array
25 of services and sites that the definitions cover, a very small

1 proportion of them would be -- don't allow persons who are
2 less than 18 to access or use those sites. So we're left with
3 still this -- we haven't restricted that universe in any
4 meaningful way by including the less than 18 years of -- of
5 age language in the -- in the statute in my opinion.

6 Q. So did you -- could you provide some guidance or can you
7 give your opinion on how -- if you're an individual subject to
8 this restriction as you have construed it, what impact would
9 that have on you in your ability to be a -- an individual able
10 to be employed or engage in society in any meaningful way?

11 MR. GRIESS: I'll object on foundation and
12 speculation. I -- and Professor --

13 THE COURT: Sustained as to form. I mean, the --

14 MR. DAHLQUIST: Understood, yeah.

15 THE COURT: I mean --

16 MR. DAHLQUIST: I'll rephrase.

17 THE COURT: -- is the Internet important? Yeah, it
18 is, and to the degree that you excluded these category of folk
19 from the Internet -- I mean, I think it -- it's obvious but if
20 you -- but you go ahead.

21 BY MR. DAHLQUIST:

22 Q. Is the Internet important?

23 A. Yes. The -- the Inter- -- I -- well...

24 Q. Go ahead.

25 A. Well, I mean, I don't want to...

1 MR. GRIESS: If there's a question, then...

2 THE COURT: Yeah, it'd be good to ask a question.

3 Why is the Internet important?

4 BY MR. DAHLQUIST:

5 Q. Is the Internet important, Professor?

6 A. I mean, the Internet is -- is important -- the Internet
7 and -- I mean, I -- I think it is important to -- to note that
8 this is broader than the Internet. It's not just the Internet
9 that is excluded. It's Internet and instant messaging
10 services and -- and the like and they're important because
11 they are the means by which people communicate with one
12 another for commercial purposes and for personal purposes.

13 It's -- and -- and going forward into the 21st century,
14 that will be more rather than less true even than it is today
15 is my summary of the importance of the Internet.

16 Q. You were in the courtroom when we did opening arguments
17 and --

18 A. Yes.

19 Q. -- you were -- you were present when the -- the Court
20 asked questions about the statutes and how they could be
21 limited; is that correct?

22 A. Yes. Right.

23 Q. And in your role as a law professor, you deal with
24 statutory language on a regular basis --

25 A. On a --

1 Q. -- I would imagine?

2 A. -- regular basis. On a regular basis.

3 Q. Could the state have crafted language that was less broad
4 to address the concerns that were raised by counsel on
5 opening? Specifically with regard to child enticement online?

6 A. Yeah. I -- I think they could. I'm not -- not going to
7 tell the State of Nebraska how to draft its statutes but
8 anything from a prohibition -- a narrow prohibition on
9 one-to-one communication between registrants and minors, for
10 example, would be a much narrower prohibition than the statute
11 or even I think as -- as the judge was suggesting in the -- in
12 the colloquy over opening -- the opening statements saying
13 that one may not visit a site that is targeted to minors I
14 think is -- may have its own ambiguities and -- and -- and --
15 and we'd have to work on crafting language but the idea
16 being -- the idea it seems to me -- and this is -- goes back
17 to the beginning of the Net -- of the Internet. This has
18 always been a problem of sort of what's the analogy.

19 We want to keep people away from school playgrounds, from
20 the junior high school dance, from places where young people
21 congregate. That's relatively easy to do in the real world
22 because there are spaces that are marked school playground,
23 junior high school dance and -- and the -- and the rest.

24 On the Internet that's very difficult to do but one
25 possibility would be something like web sites that

1 specifically target juveniles and there are lots of those for
2 perfectly innocent purposes obviously where they're actually
3 encouraging children to come and join and be members and talk
4 and join the community.

5 Or as I think the judge suggested even an objective
6 measure of sites that have -- 30 percent of their users are
7 under the age of 18 or 40 percent or some -- some number.
8 That even the State could provide as part of a service
9 actually of saying we have -- here's our survey evidence.
10 Every month they could put out a bulletin that says here are
11 the sites that have -- more than 30 percent of their users are
12 minors and those are off limits. Those you can't use.

13 You know, I'm enough of a law professor to know there
14 will be problems and arguments and difficulties with crafting
15 that statute too but that's clearly a less restrictive
16 alternative than the -- the statutory model that the State --
17 that is, it would leave open most of this vast range of
18 Internet communications -- movie sites and book and blogs and
19 shoe sales and all the rest of the stuff that's going on,
20 Wikipedia -- while targeting the places where children are
21 particularly like -- likely to congregate.

22 I think there are ways to do that that would be
23 considerably less -- vastly less broad than -- than the
24 statutory language the State has chosen.

25 Q. And you're not opining on the constitutionality of that

1 statute?

2 A. I'm not.

3 Q. You're just --

4 A. I'm not and would have to -- want to think more about it
5 and analyze it more carefully but in terms of whether it would
6 be -- you could -- you could get at those sites, you could
7 craft a statute that would narrow the prohibition to the sites
8 where I think the State interest is strongest, that is, sites
9 where really there are large numbers of children who are
10 socializing in such a way that you wouldn't run into this
11 problem, where Google would not be on that list, Amazon.com
12 would not be on that list, Yahoo would not be, etc.

13 You would allow people to continue to use the majority of
14 the Internet sites for perfectly ordinary business and
15 personal purposes while fencing off, zoning off the sites that
16 are like the playground or that are like the -- the junior
17 high school dance. I think it can be done.

18 Q. Would you consider this statute a restriction?

19 A. This statute is a -- is a -- yes. This statute is a
20 most -- in my opinion this statute restricts the ability of
21 persons covered by the statute, registrants, to conduct their
22 lives in the 21st century honestly. Personal and professional
23 and even their private lives, yes.

24 Q. Professor, would this be a -- a punishment, if you were
25 subject to this, to be denied the right to access the

1 Internet?

2 MR. GRIESS: Objection, that calls for a legal
3 conclusion.

4 THE COURT: I think so too. That'll be sustained.

5 Counsel --

6 BY MR. DAHLQUIST:

7 Q. Professor --

8 THE COURT: -- I get your point.

9 MR. DAHLQUIST: I understand, Your Honor.

10 THE COURT: To be utterly candid, I've got to make
11 that call and I appreciate the professor's expertise but his
12 view on that really wouldn't help me very much.

13 MR. DAHLQUIST: Understood, Your Honor. I'm humoring
14 Mr. Monaghan, Your Honor.

15 THE COURT: I'm trying to encourage you not to. It's
16 sort of -- sort of like feeding a voracious animal. Once you
17 start it just --

18 THE WITNESS: Yeah. They get the taste, yeah.

19 THE COURT: -- goes on and on and on.

20 MR. DAHLQUIST: I'm noticing.

21 BY MR. DAHLQUIST:

22 Q. Professor, you were also asked to review subsection
23 29-4006, subsection (1)(k) and (s); is that correct?

24 A. I'm trying to recall the statutory numbering system.
25 Sorry, is that the reporting requirements?

1 Q. The -- the information that you have to report, yes, sir.

2 A. Yes. Yes, I did review that.

3 Q. And I want to focus on subsection s.

4 A. S, yeah.

5 Q. And in particular I want to focus on towards the end
6 there after the final comma. So an individual subject to the
7 reporting requirement has to register X, Y, Z information "and
8 all blogs and Internet sites maintained by the person or to
9 which the person has uploaded any content or posted any
10 messages or information," and in particular I want to focus on
11 the "to which the person has uploaded any content."

12 A. Uh-huh.

13 Q. Are you familiar with when you go to a site how does that
14 work? Can you explain for the Court how that works?

15 A. Yeah. When you -- going to a web site, of course, is a
16 metaphor. We don't go anywhere. We sit at our desks and we
17 have a machine and what it means is very simple actually.
18 It's a request for -- you send a request for a file.
19 That's -- When you type out, you know, www.amazon.com, that
20 gets translated in the guts of your machine into a request for
21 a web -- a -- a file to be transmitted back to you, goes out
22 to the site that has the address that is associated with
23 www.amazon.com, that site gets this request and it says, oh,
24 they're -- they're asking me for the home page, for example,
25 and they send back the file that constitutes their home page,

1 and when you receive it on your computer, it gets displayed on
2 your browser.

3 So it's all file transmissions -- file requests and file
4 transmissions that constitute -- you know, surfing the web is
5 a -- a long series of those requests for files.

6 When you click on a link, the same thing happens. It
7 goes to a different site. The -- the -- Your -- your request
8 for the file goes to whatever site is in the link address.
9 The site sends you back a page. It's displayed and -- and on
10 and on it goes.

11 Q. And during the course of that transaction at requesting
12 different web sites, does a person upload content at any
13 point?

14 A. Well, there -- there is the -- obviously, sometimes
15 there's a kind of conscious and obvious uploading of content.
16 If you're submitting a -- a photograph onto a -- a blog page
17 and you say send this photograph and it gets displayed, that's
18 an obvious upload but uploading can occur in lots of ways that
19 are much less visible, even invisible sometimes, to the user.

20 Things like cookies. A cookie is a little bit of a file
21 that the web -- the first time you go to Amazon.com it -- when
22 it sends back the file that you have requested, it also sends
23 back a little file that gets stored on your machine invisibly
24 to you. It's called cookies. It's in the cookies part of
25 your machine, and it's just a little text file that says this

1 machine visited on July 15th at this time, and it -- it may
2 have some other information about what you did on the web page
3 that the web site is sending to you, and then the next time
4 you visit Amazon -- visit Amazon meaning the next time you ask
5 from Amazon that home page, the Amazon home page -- when
6 Amazon sends you the home page, they request from your machine
7 the cookies file, and you technically upload that file to
8 Amazon, and they read that cookies file to see when you were
9 there last, for example, or what you saw last so that they can
10 show you a page that is perhaps tailored to your particular
11 visit.

12 So that could be -- that happens hundreds of times in --
13 in the course of a -- daily as you're -- as you're making your
14 way around the Net. Again invisibly to you. This is
15 happening in the background.

16 If you are technically sophisticated, you can figure this
17 out. If -- you can even stop it from happening if you want to
18 if you know how to do that but for most -- the vast majority
19 of Internet users, this is taking place invisibly in the
20 background.

21 Cookies files are being deposited on their machine and
22 then sent to the web sites from their machine the next time
23 they go visit and that could be considered the uploading of
24 content. That would according to this have to be reported
25 even though you don't really know you're doing it in -- in the

1 vast majority of -- of -- of cases.

2 Q. So, in other words, every time you go to a web site
3 you're uploading a little bit of the --

4 A. You could be. It depends upon how the web site is set
5 out but you don't -- you don't know but it's certainly
6 possible that each time you go to -- to the -- the site --
7 certainly, if it's one you have been to before, they could
8 have deposited a cookie on your machine and you are now
9 uploading it to them as part of your request to -- to -- to
10 get access to that site again.

11 MR. DAHLQUIST: Your Honor, could I just have one
12 moment, please?

13 THE COURT: Sure. You might want to mute those
14 mikes.

15 MR. DAHLQUIST: Your Honor, I have nothing further.

16 THE COURT: Counsel, you may inquire.

17 CROSS-EXAMINATION

18 BY MR. GRIESS:

19 Q. Good afternoon, Professor.

20 A. Afternoon.

21 Q. If you could, it's just bugging me a little bit. Could
22 you move that microphone out of our line of sight?

23 A. This?

24 Q. Thank you.

25 A. Okay.

1 Q. You've been a professor since 1994, correct?

2 A. Right.

3 Q. Before that you were a practicing attorney?

4 A. Right.

5 Q. And a judicial clerk?

6 A. Uh-huh.

7 Q. And an anthropologist?

8 A. Right.

9 Q. Have you ever prosecuted sex offenders before?

10 A. No.

11 Q. Have any of your academic pursuits ever focused on online
12 child safety issues?

13 A. Yes. I -- I did -- I provided testimony to the -- there
14 was a commission who back in the late '90s, I believe -- a
15 child online pornography commission that was attempting in the
16 wake of several cases in which the court struck down
17 attempts -- congressional attempts to limit the access --
18 children's access to indecent material online. Different
19 problem than -- than the one we're facing here but related I
20 guess to child safety.

21 Congress formed this child online -- the COPA Commission
22 it was called, Child Online Pornography, I think. And I gave
23 some testimony about the difficulties of -- of finding this
24 material and categorizing it as indecent and some of the First
25 Amendment issues but -- but other than that I think it has not

1 been a focus of my research.

2 Q. And you said that was in the 1990s?

3 A. I think it was. I -- I think it's on my resume. If it
4 isn't, I can -- I can update that but I believe it was in the
5 late -- the late 1990s when they were -- which eventually led
6 to the -- a -- the COPPA, C-O-P-P-A, legislation, the child
7 online prevention of pornography act, or -- or something like
8 that. There was legislation that came out the back end of
9 that and that is at least ten years old so I think we're
10 talking about something 10, 12 years ago.

11 Q. Earlier you -- you mentioned what people think of as chat
12 rooms.

13 A. Yeah.

14 Q. Professor, what do you think of as a "chat room"?

15 MR. DAHLQUIST: I'm going to --

16 BY MR. GRIESS:

17 Q. How do you define that term?

18 MR. DAHLQUIST: I'm going to object as to relevance.

19 THE COURT: Overruled.

20 A. In ordinary usage, ordinary sort of Internet user speak
21 as it were, I think a chat room is -- it's the kind of
22 functionality that enables one to -- one-to-one communication
23 amongst people who are in the room, and -- and I want to put
24 quotes around in the room, get back to that in a second.

25 It enables one-to-one communication and one to many. I

1 think an important feature of what most people think of as a
2 chat room is that you can go into -- again, quote, into the
3 room and you can post a message that everyone else who's in
4 the room can see simultaneously.

5 Now, the -- the -- again, the room is a -- is entirely a
6 metaphor. There is no room but I think they're called chat
7 rooms because in the early days of the Net, America Online in
8 particular was quite well-known in the early days for these --
9 this chat room functionality which they tried to actually make
10 visually look like a room.

11 They were encouraging you to think about this as entering
12 a place where other people were and you could say, Hi, I'm
13 David Post, you know, who else is here, and everybody else who
14 was, quote, present who had logged into this place would be
15 able to see that and would be able to respond either to
16 everyone or individually to me. That's what I think of as
17 a -- that functionality I think is generally regarding as a
18 chat room.

19 BY MR. GRIESS:

20 Q. So breaking that down --

21 A. Yeah.

22 Q. -- a chat room to you requires communication?

23 A. Oh, yes, right. It is a communications platform medium.

24 Q. And it requires the proverbial room?

25 A. Well, I wouldn't want to say that because there is no

1 proverbial room. It -- it is -- the organizing metaphor is
2 that of a room. Sometimes it will be taken far enough so that
3 the software will actually look like a room, you know, with a
4 door and a window and people sitting around a table to sort of
5 encourage you to -- but that's all software mediated. I mean,
6 there is no real room. Obviously, that's just pretending to
7 be a room.

8 But it was a way to encourage -- a way to explain to
9 people in a sense what this functionality was doing. Think of
10 this as a room is what America Online was saying. It's just
11 like you're in a room with these people except they're all
12 hundreds of miles away from one another and all that but think
13 of it as a room that you have entered.

14 You can yell so everybody can hear you or you can whisper
15 to the person who's next to you. It has that functionality.
16 So it's like a room. I think that's the -- that to me is --
17 that functionality that mimics a room is part of what most
18 people mean when they -- when they think of -- when they --
19 when they say -- use the term "chat room".

20 Q. But that functionality mimicking the room not need be
21 present --

22 A. That --

23 Q. -- need not exist?

24 A. The -- the actual, like, visual display of the room
25 certainly doesn't have to exist. You don't have to make it

1 look or feel like an actual room for it to be a chat room.
2 But to me the critical functionality is it allows one-to-one
3 or one-to-many communication from amongst a set of people who
4 have voluntarily come together into a place.

5 All these -- all these metaphors get difficult. It's not
6 really a place but -- but I hope you understand what I mean.
7 That have all agreed to communicate with one another by,
8 quote, entering the room and can do so one to one or one to
9 many. That's a chat room, I think.

10 Q. So boiled down it really just requires communication
11 either one to one or one to many?

12 A. I think that's right. I think that's -- that's what...
13 Just like this room -- I'm sorry. Excuse me. I'm a law
14 professor.

15 Q. This is cross- --

16 A. I --

17 Q. -- -examination, Professor.

18 A. Forgive me.

19 Q. If I recall, in your report you had a problem with the
20 term "virtually instantaneous" as used in the definitions of
21 chat room and instant messaging --

22 A. Yeah.

23 Q. -- is that right?

24 A. Yes.

25 Q. And you believe that term is ambiguous?

1 A. I do.

2 Q. Would you agree that's -- that the instant message sent
3 from my smartphone to your smartphone arrives at your phone
4 virtually instantaneously?

5 A. That depends. I mean, since I don't -- if I think it's
6 ambiguous, I can't answer that because I don't know what it
7 means so if it -- it can take three seconds, that's easily --
8 and I don't know -- it can take -- electronic mail can take
9 four, five, six seconds actually from when you hit send to
10 when it comes up on someone else's machine.

11 For most ordinary purposes of conversation, is that
12 pretty much instantaneous? Yeah, it is. If we're talking
13 about video, is that instantaneous? No, it's not. It's not
14 fast enough. Instantaneous has to be -- so I -- I honestly
15 don't -- I don't understand exactly what's in and what's out
16 of -- of the category of the virtually instantaneous.

17 Q. But for you there's a bright line somewhere how many
18 seconds is -- is virtually instantaneous?

19 A. There must be, right? We would all agree that the --
20 four minutes is not virtually instantaneous. I think we would
21 all agree -- or eight minutes or there's some number at which
22 the -- it's no longer instantaneous. It's -- it's
23 asynchronous and -- whereas a tenth of a microsecond, I think
24 we would probably all agree that's instantaneous. It's
25 imperceptible time difference.

1 And then there's the two between and -- and I think it
2 really does matter. It matters what kind of application
3 you're talking about. E-mail is virtually instantaneous.
4 You'll get it in a few seconds. So I'm comfortable about
5 saying it's virtually instantaneous but not for --

6 Q. Professor, you said --

7 A. -- a video.

8 Q. -- in your report that --

9 A. Well --

10 Q. -- all messages whether instant messages or requests for
11 web files, those are sent, were they not, at the speed of
12 light?

13 A. Correct.

14 Q. All of them?

15 A. That's correct.

16 Q. Let's go back to the example -- the discussion that
17 centered around the word "allows," whether these sites or
18 individuals allow minors to use them. You said that there is
19 some site out there that requires, for example, credit card
20 use?

21 A. Right.

22 Q. And that you're reasonably certain that those sites, the
23 sites that require credit cards to be entered, that those
24 sites don't allow minors?

25 A. I -- you know, reasonably certain. I -- I'm comfortable

1 with saying those sites do not allow minors to enter. They --
2 they will say -- if -- if a web site says nobody under the --
3 18 may enter and in order to enter you must enter a -- your
4 own credit card, which you can only get if you are of the age
5 of majority, then I'm more comfortable saying that site
6 doesn't allow minors to enter.

7 Q. But you recognize that minors can take a credit card,
8 their parents' card --

9 A. Correct.

10 Q. -- for example --

11 A. I do.

12 Q. -- is that...

13 A. Yes.

14 Q. And still even when the minor explicitly evades the
15 conditions of the sites, that minor could still use the site?

16 A. Yes. Yes.

17 Q. Okay.

18 A. Right.

19 Q. The definition of chat room isn't up on your screen.

20 MS. SPOHN: (Unintelligible.)

21 THE COURT: Sure.

22 BY MR. GRIESS:

23 Q. Professor, you said that a site like Amazon dot --
24 dot-com would fall under the definition of chat room?

25 A. Yes.

1 Q. And you said that lots of commercial sites would also
2 fall under that definition. So in your opinion, Professor,
3 does, for example -- is Amazon.com primarily designated for
4 communication, exchange of voice transmissions or the like?

5 A. No, but it -- it -- well, yes, actually. I mean,
6 Amazon.com is designated -- what else does Amazon.com actually
7 do other than allow for the virtually instantaneous exchange
8 of text or voice communications amongst two or more computers?
9 So in that sense I think Amazon -- that's -- that is what
10 Amazon does. Amazon.com is primarily -- primarily designated
11 for that and even more narrowly it had -- there is server
12 space controlled by Amazon --

13 Q. I'm not asking about the server space.

14 A. Okay.

15 Q. Just as far as primarily designated. That's -- that's
16 what Amazon.com is there for, to communicate with one -- for
17 two people to communicate with each other?

18 A. It doesn't say -- it doesn't say two people. It says
19 "two or more computers."

20 Q. Who's sitting at the computers?

21 A. I don't know. I mean, people are sitting -- the --
22 nobody is sitting at the computer that is the Amazon computer.
23 Amazon has a computer that is running the Amazon web site and
24 all sorts of software that when I send it a message and it
25 communicates with me virtually instantaneously -- my message

1 is please show me the Amazon home page and (indicating sound)
2 it comes right back to me.

3 That's primarily designated for the virtually
4 instantaneous exchange of computer file attachments among two
5 or more computers. I think that fits Amazon.com. I do.

6 Q. I asked you a minute ago to provide the definition as --
7 as you think of it of chat room. Would you do the same for
8 instant messaging.

9 A. Instant messaging is any system that allows one-to-one
10 text commun- -- communications via text. I think I'm
11 comfortable with that, yeah.

12 Q. Any system that allows one-to-one communication via text?

13 A. Yeah.

14 Q. That's your common understanding of instant messaging?

15 A. Yeah. Yes.

16 Q. So, of course, the -- the most important element there is
17 the one-to-one communication?

18 A. Correct. Can I just clar- --

19 Q. No.

20 A. If I may -- no, no, I don't want to clarify that
21 definition. Just what I'm trying to do in -- in answering
22 your questions. You're -- you're asking me not about the
23 statutory definition.

24 Q. Right.

25 A. You're -- you're now asking me about what I think --

1 Q. I'm not asking you --

2 A. Okay.

3 Q. Yes.

4 A. I just want to make sure that's...

5 THE COURT: I -- so everybody understands what I
6 understand the series of questions to be is forget about the
7 statute, Professor, and forget about technical definitions.
8 Just in common parlance tell me what it is you understand
9 "chat room" or "instant messaging" to mean, right?

10 MR. GRIESS: Yes.

11 THE COURT: Is that how you understood it, Professor?

12 THE WITNESS: Yes, basically, yes.

13 THE COURT: Okay. Go ahead.

14 BY MR. GRIESS:

15 Q. Okay. And now I think I want to talk about the
16 definition of instant messaging.

17 MS. SPOHN: May I approach the ELMO?

18 THE COURT: Sure.

19 BY MR. GRIESS:

20 Q. Your difficulty in this statute, Professor, dealt with
21 the words "direct" and "dedicated"?

22 A. Correct.

23 Q. And you -- I think -- I believe your testimony was that
24 dedicated may have a particular technical term but that's not
25 how you thought the legislature was using it here?

1 A. Right.

2 Q. And how did you think the legislature was using it here?

3 A. Well, I -- I think the legislature was using -- actually
4 using the term "dedicated" as synonymous with private to be
5 honest. I think it is statutory surplusage. That it's a --
6 that they meant private.

7 Sending Mr. Dahlquist a message. I'm not posting it on a
8 blog. I'm not putting it up on the Internet. It's going one
9 to one and they're using dedicated and private to -- to
10 capture that.

11 Q. And what was your issue with regard to the word "direct"?

12 A. I don't -- it doesn't add anything to the statutory
13 definition. It's not a -- it -- it either means nothing --
14 when I send an e-mail message to someone, is that direct or is
15 it indirect? I mean, I guess the opposite of direct is
16 indirect.

17 Internet messages don't go directly from one place to
18 another. They move about indirectly. They bounce around.
19 The ordinary course of Internet, whether this is a phone
20 conversation we're having over the Internet, a Voice over
21 Internet, Skype, or an e-mail message that I send to you or a
22 Facebook instant messaging system message from me to you, to
23 call it direct --

24 Q. You -- Professor, you talk about that process in your
25 book.

1 A. Yeah, yeah.

2 Q. Would you explain a little bit how those messages are not
3 sent directly.

4 A. Yes. Over the Net -- anything that's traveling over the
5 Internet, anything, e-mail, web, instant messaging,
6 anything -- when it goes -- I send it to you. It's eventually
7 going to make its way to your computer. We are communicating
8 with one another. When it leaves my machine, several things
9 happen to it.

10 It gets broken up into tiny pieces. It's as though I've
11 written it out on paper and then the first thing we do is we
12 tear the paper up into a hundred pieces, little tiny pieces,
13 and then we send each of those pieces out a different way.
14 Some go via Europe, some go on the train that's going up to
15 Montreal, and some go to Mexico, and -- and they all converge
16 virtually instantaneously on your machine later.

17 I don't know what direct -- if -- if direct is trying to
18 say not like that, that's not direct. That's one plausible
19 meaning for direct is that communication is -- is not direct.
20 It's something else because it's indirect. It bounces around.
21 Then nothing on the Net is -- is direct. So I don't -- I just
22 don't know -- that doesn't add -- it's not a word that is
23 helpful to me in understanding what kind of communication they
24 want to cover and what kind of communication they don't want
25 to cover.

1 Q. But it would be your opinion that because the legislature
2 used the word "direct" that any type of instant message or
3 request for a web is -- is not direct because as you said it
4 gets broken up into pieces and sent everywhere?

5 A. Well, what -- what -- what I was trying to say is that
6 there -- as with several of these statutory abresions
7 (phonetic), there are sort of two ways to read it. If that's
8 what they meant, then it covers nothing -- it covers nothing
9 that takes place on the Internet. No Internet communication
10 is direct in the sense of traveling -- in the -- in the sense
11 of the old telephone network.

12 The old telephone network was direct. We had a dedicated
13 telephone network system we still have, the landline system.
14 I call you on a landline, we have -- there's a dedicated line.
15 There's -- I could actually walk from my office to your
16 office following a line that is holding our conversation.
17 It's open until we hang up, an actual physical line. That's
18 direct and dedicated.

19 If that's what the legislator *[sic]* meant by direct and
20 dedicated, then it covers no Internet communication
21 whatsoever. It covers no cell phone communication whatsoever.
22 So my guess is that's not what they meant. My guess is what
23 they meant, they were trying to capture a sort of private
24 one-to-one nature of conversation as opposed to one to many or
25 many to one. That -- that's what I think this is.

1 It's the private nature of this that -- that they were --
2 and I think that comports somewhat with the ordinary use of
3 the term and -- it's you and me. It's just between you and
4 me, these -- these text message. Direct and dedicated does
5 not add to that -- to my understanding of -- of what's going
6 on.

7 Q. With regard to the definition of social networking web
8 site, your primary problem with that was the collection of web
9 sites language, correct?

10 A. Yes.

11 Q. Are you familiar with the term top-level domain?

12 A. Yes.

13 Q. Can you describe that?

14 A. Yes. The way the naming system works for the Internet
15 names are organized into domains. The familiar ones -- there
16 were originally seven of the so-called top-level domains. It
17 was the -- the highest level category you had to be in to have
18 a name on the -- on the Internet, either dot-com, dot-gov, I'm
19 blanking -- oh, dot-edu, dot-org, etc. Those are top-level
20 domains.

21 They are the ones that are -- Internet reads right to
22 left for some reason. So those are the ones at the far right
23 most of your address. Www.google.com. That's in the dot-com
24 top-level domain. Temple. Www.temple.edu is in the edu
25 top-level domain.

1 There were originally seven of those plus top-level
2 domains for each country. So there's a dot-us; dot-jp for
3 Japan, dot-de for Germany, etc.

4 Q. And then the next level down?

5 A. Next level down is called the second-level domain so you
6 can register a second-level domain in a top-level domain so I
7 could get the davidpost.com. I have the David -- my -- it's
8 registered to me. But David Post is the second-level domain
9 within the dot-com top-level domain and on and on it could go.

10 Q. And what's the next level down or third or --

11 A. Third level. Www.davidpost.com is -- that's the
12 third-level domain is the www within the David Post.
13 Second-level domain within the dot-com top-level domain.

14 Q. Now, Professor, I -- I know web sites will often have
15 something to the right of the dot-com.

16 A. Correct.

17 Q. For example, if I went to David -- www.davidpost.com,
18 there might be a back slash and then --

19 A. Index.

20 Q. -- or a symbol "about" where it has your bio.

21 A. Correct.

22 Q. What's that about? What -- how would you describe that?

23 A. That's a directory. That -- that's an ordinary -- on the
24 machine that has the address www.davidpost.com, that's --
25 there is a physical machine to which messages would be

1 directed on the Internet that has an IP address -- that has an
2 IP number at that name and that machine can like your ordinary
3 laptops be organized into different subdirectories.

4 There can be the file subdirectory, the picture
5 subdirectory, the -- et cetera or it can have individual files
6 like about dot-html on that machine.

7 So that's designating something that's -- it's not part
8 of the addressing system -- the Internet's addressing system.
9 The Internet addressing system is to the left of the slash.
10 Top-level domain, second-level domain, third-level domain,
11 fourth-level domain. That's all resolved on the Net.

12 So the right of the slash is in a sense your business on
13 your machine. You can have any sorts of directories and files
14 on your machine that you want that will appear on the right
15 side of that.

16 Q. So if I'm administrator of a -- I guess it'd be
17 third-level domain -- or let's take you, for example. You
18 have the web site www.davidpost.com.

19 A. Right.

20 Q. You're the administrator for that site.

21 A. Okay.

22 Q. You control everything that would appear in any directory
23 which is -- would be to the right of that?

24 A. Correct. That's -- that's -- that's correct.

25 Q. Would it be fair to say that all of those directories --

1 that would be a collection of web sites?

2 A. I mean, the -- the only problem I'm having with --
3 with -- with that question is that they may not be web sites.
4 You know, there's -- to the right of the slash, I could have
5 lots of files. They could just be individual picture files.
6 My vacation in Nebraska 1.jpg, my vacation in Nebraska 2.jpg.
7 They could all appear to the right.

8 Calling that a collection of web sites is a little -- a
9 collection of web sites -- a collection of something and I
10 guess given that if it's accessible over the Internet -- if it
11 was www.davidpost.com slash my vacation in Idaho and then
12 Nebraska 1.jpg, then I guess that could be a collection of web
13 sites, I suppose. It's -- I'm a little uncomfortable with
14 that just because they're not web sites.

15 Q. But you would have control over all of those --

16 A. But I -- but -- correct. I would have -- I could make
17 those visible or invisible in my capacity as controlling
18 the -- the machine that has the address www.davidpost.com.

19 Q. So, for example, having control over all those
20 directories underneath davidpost.com, you would not have
21 control over any directories that fall under kevingriess.com,
22 correct?

23 A. Correct. Right.

24 Q. With regard to the -- I refer to it as (k) and (s)
25 information, the subsections k, subsection s. You're familiar

1 with those --

2 A. Right.

3 Q. -- provisions?

4 Would you agree that it's fairly simple for an individual
5 to know what their e-mail address is?

6 A. I think so, yeah.

7 THE COURT: Except if you work for the government.

8 THE WITNESS: Right.

9 BY MR. GRIESS:

10 Q. And you also agree, Professor, that it would be easy for
11 a person to know what their chat room identifier is, correct?

12 A. I'm a little more -- I'd like to go back and look at the
13 definition of chat room again.

14 Q. Isn't that -- isn't any identifier of a person
15 self-selected?

16 A. Well, I don't -- I guess I don't know.

17 MS. SPOHN: May I approach the ELMO?

18 THE COURT: Sure. And you all can have continuing
19 leave to do that.

20 MS. SPOHN: Okay. Thank you.

21 THE WITNESS: I think that's a little more
22 problematic actually than -- if -- if chat room means server
23 space on a communications network, if -- if that --

24 BY MR. GRIESS:

25 Q. I'm talking about the identifier.

1 A. Well, I understand that. But what is my identifier when
2 I communicate with someone via a SMS via a text system? I
3 guess it's my phone number but I -- I don't really know. I
4 don't know. That's not a term I'm -- I'm comfortable with or
5 familiar with to be -- to be honest.

6 If you're asking do you -- the self-selected identifiers
7 you should be able to -- to report fairly easily. In the
8 ordinary chat room, the common sense chat room definition, the
9 America Online chat room where you come in and you have a
10 screen name that you're identified with, that's fairly
11 straightforward, I think, yes.

12 Q. So which -- you just a second ago said that certain
13 identifiers may not be identifiable --

14 A. Well --

15 Q. -- or known to a person?

16 A. Yeah. Just like the Internet Protocol address it
17 would -- could be a chat room identifier, I guess, given the
18 chat room is practically -- the definition of chat room
19 practically covers the entire Internet.

20 I don't know what my Internet Protocol address is when I
21 sent Dahlquist an e-mail message this morning. I don't know
22 what my identifier is when I send him a -- a -- a text
23 message. I mean, I -- it might be my phone number, the number
24 on my phone, or it might be some internally generated address
25 that the -- AT&T uses to identify me, 5JG791234X. I have no

1 idea. It finds it -- there must be an identifier because if
2 he hits reply, it comes back to me. It's probably my phone
3 number but I -- honestly, I don't know that. I -- I'd need to
4 know more about how that system worked.

5 Q. But the identifier that you just spoke about in the
6 answer you provided, that's not the identifier that shows up
7 on the screen I'm typing away to somebody else, is it?

8 A. Well, it may not be. That's the problem in a sense.
9 Just as your IP address doesn't show up on the screen when you
10 send an e-mail or request a web page but it's a critical
11 component of identifying you. So if my text system uses some
12 crazy identification system -- I know -- I know enough about
13 the engineering of this to know that they could be. They
14 don't have to use the phone number. They could have a whole
15 different system for identifying where did this message come
16 from so that when you get it and you reply to it, it makes its
17 way back to me. That could be the serial number of my device
18 for all I know. I don't know how -- what they're using as an
19 identifier.

20 Q. So you're distinguishing -- distinguishing between --
21 distinguishing that type of identifier from the identifier
22 that -- for example, if I'm using a chat room and I log in as
23 HuskerFan#1 --

24 A. Correct.

25 Q. -- that's the identifier that's going to show --

1 A. I think that those are --

2 Q. -- up to the screen?

3 A. -- those are different and -- and, clearly, it is easier
4 to -- just as you said you know what your e-mail address is.
5 Yeah, you -- when you choose a -- a handle, a screen name, a
6 pseudonym for your e-mail, that's not burdensome to -- to know
7 what that is.

8 I know what my e-mail addresses are. I don't know all
9 the identifiers -- my -- all my chat room identifiers within
10 the meaning of this because it's not restricted to the ones I
11 have chosen.

12 Many of these are machine generated, and -- and they are
13 largely invisible to me as a user just like the IP address is
14 machine generated and it's not visible to me but it's hard --
15 hard to find.

16 Q. Next, Professor, I want to revisit the cookies
17 discussion. So if I understand this right, if I -- if I type
18 in www.amazon.com, that web page comes back to my computer and
19 it's displayed on my browser --

20 A. Right.

21 Q. -- at the same time they send a little file that -- the
22 cookie --

23 A. Right.

24 Q. -- that's embedded on my computer?

25 A. Right.

1 Q. And anytime I interact then with Amazon, I'm sending
2 something their way?

3 A. They're -- they're -- they are sending a -- a message to
4 your computer that says please send me the cookies file, if
5 you have one, in effect from Amazon.

6 Q. And that's a request made by Amazon to my computer?

7 A. I think that's correct. I -- I'm -- I would want to
8 check that. I'm reasonably certain that that is correct that
9 that comes -- it's not automatically sent -- as I'm speaking,
10 I'll realizing it -- it -- it could -- I'm not sure. I think
11 that may vary actually.

12 That may be software dependent as to whether the web site
13 requests it -- Amazon requests the transmission after they
14 receive my request or actually simultaneous with my request to
15 Amazon I say, Please send me your home page and, oh, by the
16 way, here's my cookies file that you deposited on my machine
17 two weeks ago. I'm not sure how that -- my guess is it
18 probably can work either way.

19 Q. But as I'm sitting --

20 A. Yeah.

21 Q. -- at my computer --

22 A. Yeah.

23 Q. -- using Amazon.com, I'm not consciously making a
24 decision that, hey, I need to send my cookie file?

25 A. No, no, no. That's certainly true, right. Whatever --

1 however it gets transmitted, it's entirely in the background
2 and in -- largely invisible to you as a -- certainly as an
3 ordinary user all that is invisible.

4 MR. GRIESS: That's all the questions I have, Your
5 Honor.

6 THE COURT: Redirect?

7 REDIRECT EXAMINATION

8 BY MR. DAHLQUIST:

9 Q. Professor, I want to take a step back and talk about the
10 conversation you had with Mr. Griess about collection of web
11 sites under the definition of social networking web site.

12 A. Uh-huh.

13 Q. We -- we don't necessarily need to put it up. Just a --
14 just a couple of questions. So if you are the administrator
15 of a www.davidpost.com --

16 A. Uh-huh.

17 Q. -- you can -- can you explain again -- and I wasn't too
18 clear on this. You can control where the -- the web sites
19 that are pulled up by describing something after the dot-com
20 part?

21 A. Yes. In other words, the Internet's job is finished at
22 the -- at the dot-com part. In other words, www.davidpost.com
23 unambiguously from anywhere on the Net around the world -- if
24 you send a message to that machine, the Internet will get it
25 to a particular machine that is sitting somewhere that I have

1 designated because I am the registrant of that domain. I
2 designated all messages go to this machine. It could be the
3 machine in my office. It could be a hosting machine. It
4 could be anywhere but I -- you know.

5 The Internet at that point is thank you very much, I've
6 done my job. I've -- that's what it does is it routes
7 messages directly based on their addresses, their domains.

8 On that machine I can -- I can put a file right now -- I
9 could put a file on that machine that I could -- oh -- let me
10 explain it this way: There can be individual files on that
11 machine that are retrievable by requests. I could put a file
12 that's a photograph 1 onto the -- in the memory of that
13 machine and if you go to the, quote, web site
14 www.davidpost.com/photograph1, it will retrieve not the home
15 page but the index -- [index.html](#) or [about.html](#) [sic].

16 It will retrieve this file [photograph.1.jpg](#). That's a
17 file that I've placed there that -- and you could have
18 multiple file -- just as on your machine. You have multiple
19 levels of -- so -- so if you think about the system. To the
20 left of the slash, that's the Internet's hierarchy.
21 [Www.davidpost](#) -- it could be even
22 [engineeringdepartment.computersciences.schoolofartsandsciences](#)
23 [.temple.edu](#). That's the Internet's hierarchy. The Internet
24 works out what that'll mean.

25 To the right of the slash is my hierarchy. I can set up

1 that machine to have 14 different directories; pictures,
2 photographs, texts, downloads, uploads, this stuff, bad stuff,
3 good stuff. And under that files and subdirectories and
4 sub-subdirectories and sub-subdirectories just like you do on
5 your -- and other Windows machine, you have directories and
6 sub -- all that information is to the right of the slash.

7 So I could -- I could post a file 14 levels deep in my
8 machine under the work files folder and 2012 subfolder, July
9 subfolder, Nebraska SORNA case subfolder, constitutional
10 issues sub- -- all that and I could put that on that machine
11 and then you could retrieve -- if you knew -- if you knew it
12 was there, you could retrieve it by typing www.davidpost.com
13 slash, put in its address -- its local address on my machine
14 to the right of the slash. That's the best I can explain it.

15 Q. Okay. And that -- that's what I want to focus on --

16 A. Okay.

17 Q. -- that -- how you know it's there. So could you --
18 let's -- I'm thinking of a typical web site here. We're on
19 the -- say, the right-hand or either the left-hand column has
20 links and you can go to, say, in this example -- could you set
21 it up so you do www.davidpost.com -- could you set it up where
22 those different directories are listed --

23 A. Oh, that's exactly what I do actually. If you go --

24 Q. Okay.

25 A. -- yeah, most people do this. In other words, www dot --

1 if you send a request to www.davidpost.com, just type that
2 into your browser, you'll get back a page that -- that I have
3 entered in at some point in the past. On that page -- that's
4 a file. It's just a file that's residing in this computer
5 that gets sent to you automatically.

6 In that file there can be links so I -- I do have links
7 to amicus briefs. There'll be a -- a thing in the upper left.
8 It'll say read the amicus brief I just filed. That's
9 residing -- if you click on that link, you then go to -- you
10 are taken to -- the code in the back of that link takes you to
11 www.davidpost.com slash, the folder called amicus briefs, and
12 in that -- and then you see what's in that folder and then you
13 click on one of those and you bring up the file.

14 So it's a way you can make the internal directory
15 structure of your machine visible to people on the Net if you
16 want to using this -- to the right of the slash is where
17 you -- you -- you encode that information, if you will.

18 Q. And so that's how you -- that system, that directory
19 you're talking about, that's how you inform someone looking at
20 your web site what is on your --

21 A. That's --

22 Q. -- directory?

23 A. -- correct. That's one way to do it --

24 Q. Okay.

25 A. -- is just to -- to list it and -- and to link to it and

1 then they say, oh, yeah, I want to read that amicus brief and
2 they click and, lo and behold, it comes up. If you look at
3 the address, you'll see it's got a slash in it and it's got
4 some directory but ordinarily you don't care about that.

5 Q. And so let's say at the bottom of that list, could you
6 also provide a link to, say, another directory?

7 A. Absolute -- absolutely. Absolutely.

8 Q. And you wouldn't necessarily have control over that
9 directory but you could link to it?

10 A. You could have a link to a directory on another machine
11 which you would have no control over. Is that what you mean?
12 In other words, I could have a -- a list -- well, I'm sorry.

13 Q. Yeah. For example, could you have a link to
14 www.kevingriess.com?

15 A. I could, absolutely. And -- and I can -- and it will
16 look -- the Internet is designed to make these more or less
17 interchangeable. That is, you don't know -- if you go to my
18 home page, I'll have a list of five things; read my papers,
19 here's some interesting blog posts, stuff I've read in the
20 past few days, important breaking news and something else.

21 Some of those will -- if you click on them will bring you
22 files that are coming from my machine. Some of them will
23 bring you files that are coming from elsewhere on the
24 Internet, that are coming from Kevin's machine and -- it's
25 designed to allow that sort of transparency. It's not -- the

1 user doesn't have to know.

2 That's the -- really the wonderful part of it in a sense
3 is that the links look the same, the files look the same
4 whether they've come from just one level deeper in this
5 machine or some machine that's sitting in Shanghai. It's very
6 hard for you to know. It's largely invisible to the user
7 which -- which is really happening.

8 Q. Professor, you also answered a few questions about the
9 term "allows" --

10 A. Yeah.

11 Q. -- again, whether a web site "allows" someone under the
12 age of 18 to use or access its web site. Would an emancipated
13 minor who is potentially under the age -- let -- let me phrase
14 this differently.

15 Are you familiar with whether an emancipated minor could
16 form a legally binding contract?

17 A. I wasn't expecting that question. I'm familiar with --

18 MR. GRIESS: I'll object, Your Honor, on foundation.

19 A. -- I'm familiar with that as a -- as a difficult legal
20 issue, yes.

21 THE COURT: I -- I think that that will be sustained.

22 THE WITNESS: Oh.

23 THE COURT: The -- there was an objection that you
24 didn't here, Professor, I'm sorry.

25 THE WITNESS: Sure.

1 THE COURT: I -- I don't think this is -- that --
2 that's sort of an -- you know, Paige, who's made the Law
3 Review, is going to have to write a Law Review article next.
4 So if you want to write --

5 THE WITNESS: It's a good one.

6 THE COURT: -- an emancipated minor being able to log
7 onto --

8 THE WITNESS: Right.

9 THE COURT: -- www.dr.post.com even though he
10 prohibits anybody from 18 from doing so, have at it.

11 THE WITNESS: Yeah.

12 THE COURT: So we don't need to answer that.

13 THE WITNESS: Okay.

14 THE COURT: Go ahead.

15 BY MR. DAHLQUIST:

16 Q. Professor, for your time and involvement in this case,
17 you were paid a fee; is that correct?

18 A. Yes.

19 Q. And what -- what are you charging the plaintiffs in order
20 to provide that?

21 A. Three hundred dollars an hour is my fee, I think.

22 MR. DAHLQUIST: If I didn't do it previously, I would
23 like to offer Exhibit 304, which is the expert report and --
24 did I offer it? Okay.

25 MR. DORNAN: I think you did.

1 THE COURT: I've received it.

2 MR. DAHLQUIST: Okay. I couldn't remember. I don't
3 have anything further, Judge.

4 THE COURT: Professor, I've got a -- just a couple of
5 very quick questions. With regard to this collection of
6 Internet -- "collection of web sites" issue --

7 THE WITNESS: Uh-huh.

8 THE COURT: -- if -- if I understood your concern, it
9 was twofold. One, anything to the right of the dot-edu you
10 said could conceivably be looked at as a collection of -- of
11 sites.

12 THE WITNESS: Right.

13 THE COURT: But your primary concern was not that.

14 THE WITNESS: Correct.

15 THE COURT: Your -- Let's take the Chrome Operating
16 System. Are you familiar with that?

17 THE WITNESS: Uh-huh.

18 THE COURT: Is that a collection of web sites?

19 THE WITNESS: No, I don't think Chrome -- no, I -- I
20 wouldn't say --

21 THE COURT: Give me an example then.

22 THE WITNESS: Oh, a -- a -- a collection of web sites
23 could be Google, the search page of Google, Google Maps,
24 Blogger, YouTube, Google Translate. Those are all different
25 sites but plausibly connected as a collection -- even as I say

1 that, I'm -- why do I think they're a collection? Well,
2 they're a collection of sites -- they're a single collection
3 of sites because they're all listed, for example, on the
4 Google home page. So I can reach them in one click from
5 Google dot-com --

6 THE COURT: But you could also reach them separately?

7 THE WITNESS: But I can also reach them separately.
8 Some of them may be in the Google.com domain. So some may
9 be -- it may be blogger.google.com or gmail.google.com. Some
10 are not. YouTube has got its own dot-com. That's -- To the
11 engineers they don't care about that.

12 THE COURT: Sure.

13 THE WITNESS: Irrelevant. I have -- So there are
14 various ways one could define this collection. It could be a
15 corporate definition. They're in the same collection because
16 we are, in fact, all controlled by Google but I happen to know
17 that but other people may not.

18 THE COURT: Sure.

19 THE WITNESS: I only don't know where this collection
20 of sites -- how do I know when I'm in a different collection
21 of sites? I think that's a very difficult ambiguity in the
22 statute. It really is.

23 THE COURT: All right. There are sites now that --
24 Are you familiar with ViBar? ViBar, V-i-b-a-r. It's -- it's
25 a Voice over IP where you call internationally.

1 THE WITNESS: Oh, sure.

2 THE COURT: All it does is provide audio.

3 THE WITNESS: But -- okay.

4 THE COURT: Would -- would VIBar be covered by any of
5 these definitions?

6 THE WITNESS: Oh, sure. Isn't it a -- it's a chat
7 room. It's a chat room, I believe, because it is service
8 based on the Internet or communications network for the
9 virtual instantaneous exchange of voice transmissions between
10 two or more computers.

11 I think Voice over IP is a -- is a -- any Voice over IP
12 function -- service would be -- would be a statutory chat room
13 even if that's all it does.

14 THE COURT: So in VIBar you can also exchange the
15 text messages but --

16 THE WITNESS: Right.

17 THE COURT: -- but the more we use Voice over IP and
18 go away from what we consider standard landlines --

19 THE WITNESS: Yeah.

20 THE COURT: -- it's your view that the, quote,
21 telephone is covered by this statute?

22 THE WITNESS: The -- the old-fashioned telephone --

23 THE COURT: No, no. The -- what --

24 THE WITNESS: Oh.

25 THE COURT: -- we generically think of the

1 telephone --

2 THE WITNESS: Oh.

3 THE COURT: -- is covered by the statute?

4 THE WITNESS: Correct. In other -- that -- that when
5 people now say, oh, I called my grandmother in whatever, she's
6 visiting in Australia, they can mean, and often do mean
7 nowadays that they used a Voice over IP service. I mean, the
8 distinction between -- to the use -- whether it's a cell
9 network call, a landline call or a Voice over IP call, it's
10 largely -- we don't care as we -- we call it all a telephone
11 call.

12 THE COURT: Well, not to put too personal a point on
13 it. I have a grown child in Australia and a grown child in
14 China and on my iPhone I have a green thing that looks like a
15 phone --

16 THE WITNESS: Right.

17 THE COURT: -- and a purple thing that looks like a
18 phone.

19 THE WITNESS: Right.

20 THE COURT: One is ViBar and one I got to pay for --

21 THE WITNESS: Right.

22 THE COURT: -- and I try not to hit the one I got to
23 pay for --

24 THE WITNESS: Right.

25 THE COURT: -- when I -- when I hit -- when I make

1 those choices. And one is entirely over the -- the Internet.

2 THE WITNESS: Correct. Right. The VIBar is entirely
3 over the Internet. That's why they can do it so cheaply. It
4 does have this feature that Mr. Griess was -- it -- it does --
5 it's not dedicated -- you don't have a dedicated line with
6 your son or daughter in Australia in the way that you used to
7 with a -- if it's going over the Internet, it -- it does take
8 this indirect route.

9 THE COURT: Well --

10 THE WITNESS: It's amazing how it works but it does.

11 THE COURT: But if it's encrypted, it's sort of
12 dedicated, isn't it?

13 THE WITNESS: It's certainly private.

14 THE COURT: Yeah.

15 THE WITNESS: It is -- and I think it is private.
16 Dedicated in a -- I don't know exactly what they meant by
17 "dedicated". That's my problem.

18 THE COURT: Okay.

19 THE WITNESS: But I think in answer to your question,
20 yes, we would call that a phone call even though it's covered
21 by the statutory definition of chat room. That's right.

22 THE COURT: All right. I've got to let the lawyers
23 follow up. First for the plaintiff and then the defendant and
24 then the plaintiff.

25 MR. DAHLQUIST: I have no further follow-up.

1 THE COURT: Counsel.

2 MR. GRIESS: I have none.

3 THE COURT: Thank you, Doctor -- or, Professor. I
4 appreciate your testimony.

5 THE WITNESS: Thank you.

6 THE COURT: Shall we take a 15-minute break now? Is
7 that agreeable?

8 MR. DAHLQUIST: That's agreeable.

9 THE COURT: All right. Fifteen minutes.

10 (Recess had at 3:18 p.m.)

11 (At 3:36 p.m. on July 16, 2012, the following proceedings
12 were had:)

13 THE COURT: Be seated. Counsel.

14 MR. DAHLQUIST: Your Honor, we've -- we agreed with
15 the attorney for the State that the State's expert, Mr. Nigam,
16 would be testifying after Professor Post. We relied on that.
17 Professor Post, you know, came into town and made
18 accommodations to be here and --

19 THE COURT: Sure.

20 MR. DAHLQUIST: -- we -- it's my understanding that
21 the State's not intending to call -- we -- we would like to
22 have Mr. Nigam called to the stand now. We -- we kind of
23 planned on that. That was -- for purposes of travel
24 arrangement, that's what we would like to do.

25 THE COURT: You mean so you can call him as a

1 rebuttal expert?

2 MR. DAHLQUIST: That's right. We'd like him to be
3 here when their expert testifies but I think there's a little
4 bit of a...

5 THE COURT: Counsel.

6 MS. SPOHN: Your Honor, we're not going to get done
7 with Mr. Nigam today or I don't anticipate that we would be
8 done with him yet today and we want to use a little bit of
9 time to ingest what plaintiffs' expert has said today in
10 further developing our testimony, and there's plaintiffs
11 for -- Does that are here right now whose testimony we could
12 accomplish at this time.

13 THE COURT: Okay.

14 MR. DAHLQUIST: Your Honor, they --

15 THE COURT: Hang on just a minute.

16 MR. DAHLQUIST: Sure.

17 THE COURT: When does your professor leave?

18 MR. DAHLQUIST: Well, he's planning on leaving
19 tomorrow. We're trying to get a -- later tomorrow in the
20 morning, about 10 -- 10:30. And so what we were -- we're
21 trying to see if we could get a later flight that day but...

22 They've -- they've -- and the issue of digesting what
23 Professor Post testified to, Your Honor, they've had his
24 report, they deposed him. There's no need to integrate what
25 he said into whatever they're -- questioning they're going to

1 have for their expert. I -- I think we -- we talked about
2 this in advance with counsel, and this was the plan, and what
3 we'd like to do is have him -- have their expert come and --
4 and testify so we can have Professor Post here and --

5 THE COURT: Sure. Okay. Did you all tell them that
6 you were going to -- this is okay? That you'd call your guy
7 after their guy testified?

8 MS. SPOHN: Out of order but we never agreed that it
9 would be immediately after and our thinking had been that we
10 would be allowed to have him do it all at one time as opposed
11 to spread it out over the course of a few days.

12 THE COURT: Was your guy here for Professor --

13 MS. SPOHN: He can be, yes.

14 THE COURT: No. Was he here to listen to Professor
15 Post --

16 MS. SPOHN: Yes, Your Honor.

17 THE COURT: So it's not as if you have to describe
18 the testimony to him?

19 MS. SPOHN: No.

20 THE COURT: He was here -- has he gone home or back
21 to the hotel or...

22 MS. SPOHN: No. No. He's --

23 THE COURT: Hanging out?

24 MS. SPOHN: -- downstairs.

25 THE COURT: He's what?

1 MS. SPOHN: He went to get a coffee.

2 THE COURT: Okay. Well, here's what we're going to
3 do. If -- I'd like you to put him on but you certainly can
4 have the morning -- we'll start a little bit early in the
5 morning so you can have time to -- you can address the issues
6 that he's unprepared to address with Professor Post in the
7 morning.

8 Is Professor Post flying out of Lincoln or Omaha?

9 MR. DAHLQUIST: Out -- out of Omaha.

10 THE COURT: And you say his -- his airplane's at
11 10:30?

12 MR. DAHLQUIST: Ten -- ten o'clock.

13 MR. DORNAN: Ten o'clock, Your Honor.

14 MR. MONAGHAN: Your Honor, I called the office to see
15 if there are later flights. He's flying from -- on Delta to
16 Cincinnati and then to Hartford so that he can drive to
17 Boston. I haven't heard back from the office yet to see
18 whether or not there are available flights.

19 THE COURT: Well, we --

20 MR. MONAGHAN: And we haven't looked to see whether
21 that's available in Lincoln. We can do that as well.

22 THE COURT: Well, the best I can do to accommodate
23 both sides is let's -- if -- if you don't have a really big
24 objection -- and if you do, you can make it and I'll rule on
25 it -- but let's put your guy on, have him testify what he was

1 going to testify to and then if -- if you aren't done with
2 him, we'll start again in the morning but we'll start early
3 and that'll give you the evening to prepare him to address
4 Professor Post's comments.

5 MS. SPOHN: Okay.

6 THE COURT: Is that acceptable?

7 MS. SPOHN: Yes, Your Honor.

8 THE COURT: Okay. All right. Do you want to go get
9 him?

10 MS. SPOHN: We're retrieving him right now.

11 THE COURT: Okay. Hello, sir. You're --

12 UNIDENTIFIED MALE VOICE: (Unintelligible.)

13 THE COURT: No, no. Don't worry about it. Have a
14 seat in that witness stand there, sir. You can give counsel
15 your coffee if -- I think -- yeah. There you go. And if you
16 need -- there's a glass of water there, sir. Then if you'll
17 follow this lady's directions, she'll swear you in.

18 If you'll let him get his water first. Okay. Swear the
19 witness.

20 COURTROOM DEPUTY: Please state and spell your name
21 for the record.

22 THE WITNESS: My name is Hemanshu Nigam, and it's
23 spelled H-e-m-a-n-s-h-u, last name's N-i-g-a-m. N like Nancy,
24 i-g-a, m like Mary.

25 COURTROOM DEPUTY: Thank you. Please raise your

1 right hand.

2 HEMANSHU NIGAM, DEFENDANTS' WITNESS, SWORN

3 THE COURT: Counsel, you may inquire.

4 DIRECT EXAMINATION

5 BY MS. SPOHN:

6 Q. Mr. Nigam, where do you work?

7 A. I actually run a company called SSP Blue and SSP stands
8 for safety, security, privacy, and our tag line is your
9 blueprint for online safety, security and privacy, and it's
10 based out of Los Angeles.

11 Q. And what's your position there?

12 A. I'm the founder and CEO.

13 Q. Did our ask -- our office ask you to prepare an analysis
14 as to the constitutionality of Nebraska Revised Statute
15 29-4006 and 28-322.05?

16 A. Yes. And I -- I think your request wasn't actually
17 whether or not it's constitutional but how does the statute
18 apply in real-life terms as opposed...

19 Q. Thank you. What materials did you review in preparing
20 for your testimony today?

21 A. I looked at some of the materials provided by
22 Assistant General Counsel -- or whatever you guys are
23 officially called -- Kevin Griess, one of which was the
24 judge's request for further information. Other -- another
25 was -- was a report submitted by Professor Post and then

1 material that I had on my own as well as Internet research.

2 Q. Did you also look at the statutory language?

3 A. Yes.

4 Q. Did you -- And the questions raised by the judge would
5 have been part of the summary judgment order --

6 A. Yes.

7 Q. -- he issued? Okay.

8 And did you complete your analysis?

9 A. Yes.

10 Q. And are you prepare- --

11 A. In January I think 18 of 2011.

12 Q. And are you prepared to discuss that today?

13 A. Yes.

14 Q. Before we get there, let's -- let's go back a little bit
15 to what you're doing at SSC -- SSP Blue. Can you explain your
16 duties there?

17 A. Yeah. I -- I run a company whose job is to provide
18 strategic bill consulting to corporations and sometimes
19 governments and non-profits on anything from technology to
20 policy to public relations and anybody in between that's tied
21 to online safety, security and privacy. So we can -- I don't
22 know if you want examples or what would help.

23 Q. Yes, that'd be helpful.

24 A. We could have a client who comes to us and says that
25 they're having trouble with either hackers or Internet

1 predators or privacy issues on the site. They're trying to
2 figure out what they should be doing about it from a
3 technology perspective, an educational perspective, a policy
4 perspective, a law enforcement perspective or even a public
5 relations perspective and we provide the strategic counsel
6 needed to -- counsel not from a legal counsel but counsel from
7 a business sense in terms of what should be done on the
8 technology side, what should be done on the education side,
9 what types of non-profits they should -- they should work with
10 to gain further expertise, what kind of educational material
11 should they provide to their users and to the public, what
12 type of information should be given to the press so that they
13 understand what's going on.

14 If they're in discussions with government, whether it's
15 investigators or law enforcement, the kinds of information
16 that would be helpful to retain to provide when it's legally
17 acceptable to disclose it.

18 We do things like even hack into people's web sites and
19 figure out if there's vulnerabilities and then help them fix
20 it. We look at privacy policies and compare it to actual
21 practice on the company site from the perspective of what data
22 is being collected, who owns -- who owns the data, where's the
23 access controls on that data, whether the data is encrypted at
24 rest or in motion or whether it should be, what types of
25 password controls they have, what type of internal controls

1 they have versus external controls.

2 We in essence become your virtual team for online safety,
3 security and privacy from every aspect you can think of in
4 that sense.

5 Q. How does -- how does SSP Blue enhance the online safety
6 for children? How do you -- for your customers or your
7 clients?

8 A. So from a child-specific perspective, we will do things
9 like assess the product. We will take a product such as a
10 social networking site and we will access using our own people
11 the product from the perspective of a Internet predator, from
12 the perspective of a government agent investigator, from the
13 perspective of a typical user, and we will try to do things
14 that we think that type of person would be doing on the site,
15 find out where the vulnerabilities are, find out where the
16 successes are in terms of whether, for example, access was
17 blocked between a stranger and a -- a teenager on the site
18 that should have been blocked or if that was allowed when it
19 should have been allowed, and then we will create a report --
20 an assessment report with a series of recommendations on what
21 the company can do to make improvements in that area.

22 And those improvements can be in the areas of using the
23 product from the front end, the featured -- features and
24 controls, the reporting mechanisms, what should be happening
25 on the back end. In other words, when the personnel inside

1 the company is getting a report, how should they structure
2 responding to, say, a suicide threat, an Internet safety
3 threat, a harassment threat, a bullying threat, a -- a bomb
4 threat or blowing up a school threat, whatever it is, but
5 anything that pertains to the safety of children on the site
6 or we'll look at content controls.

7 So if somebody's uploading child pornography, when would
8 it be identified, how would it be identified, how would it be
9 reported to things like the National Center for
10 Missing/Exploited Children. We will look at adult pornography
11 or any other kind of inappropriate conduct that the content at
12 the site has said it doesn't allow them to -- under the terms
13 of use and we'll examine whether that's possible to do.

14 If it is done, how long does it take to identify it, how
15 do you report it, how do you take it down, what does the staff
16 do, what kind of training the staff has, what kinds of
17 guidance the staff has in determining what things should be
18 taken down, what things should be kept up. If there is a
19 report, whether or not an account should be terminated or
20 warned or other things like that.

21 We look at conduct between individuals. So we look at
22 content, contact and conduct. Those are the three c's we try
23 to simplify it into. And in terms of conduct, we'll
24 examine -- if there's a teenager on the site under the age of
25 18, can an adult contact the person, can -- if they can send a

1 friend request, for example, can an individual block another
2 person.

3 We'll look at whether or not there are trigger mechanisms
4 on the back end so an adult who may have been contacting ten
5 kids and all of them have blocked it or rejected the friend
6 request, do they have some sort of bells and whistles that go
7 off on the back end that tell a support person take a look at
8 this particular site 'cause there seems to be too quick, too
9 many blocking of an adult from children on the site,
10 therefore, there may be a possible predator alert.

11 We'll look at whether a company has controls in place
12 that stop registered sex offenders from joining the site, if
13 that's what they want to do. We actually provide a service
14 for that as well to two companies out there right now of
15 access to a registered sex offender database that has
16 registered sex offenders in the database from 51 different
17 locations, 50 states plus the Washington -- Washington, D.C.
18 district.

19 Q. Prior to SSP Blue, where were you employed?

20 A. I was the chief security officer of News Corporation and
21 MySpace, which was owned by News Corporation, as well as for
22 Fox Interactive Media, which was another division inside of
23 News Corporation. I served in all three of those capacities
24 during my four-year tenure there.

25 In the News Corporation tenure, I was responsible for the

1 online safety, security and privacy of 40-plus digital
2 properties that News Corporation owned. I was also
3 responsible for all of the safety, security and privacy
4 aspects of MySpace and the Fox Interactive Media web sites
5 which included sites like ign.com, AmericanIdol.com,
6 foxnews.com.

7 Fox Interactive Media also owned askmen.com,
8 rottentomatoes.com which is now sold -- some of those have
9 been sold to other proper- -- other companies. There was also
10 photobucket.com which is a photo site much like Flickr so...

11 Q. What kind of safety and privacy features did you
12 implement at News Corp. or MySpace?

13 A. In the MySpace I -- and some of these other sites, I
14 think we put in over 150 different types of features and
15 controls and programs during my time there. They included
16 things like controls on who can access the site, who can
17 connect with whom on the site, what types of content can be
18 uploaded, how did that content get identified, how does an
19 individual block another individual, changing the reporting
20 mechanisms, adding specific features in reporting so that you
21 can choose what type of contact or conduct you're reporting.

22 I mean, I don't know how -- what type of areas you want
23 to focus on but I can...

24 Q. What about -- what was the minimum age for someone at
25 MySpace to -- in its terms of use? What -- what was the

1 minimum age?

2 A. When it was actually initially --

3 MR. DAHLQUIST: I'm going to object -- object on
4 foundation, Your Honor. Just state that it doesn't -- the
5 question doesn't specify what time -- time period we're
6 talking about, whether it covers when Mr. Nigam was associated
7 with it or -- or contemporaneously.

8 THE COURT: Sustained.

9 BY MS. SPOHN:

10 Q. When you were employed at MySpace, what was the minimum
11 age for someone to use MySpace?

12 A. For the Court's benefit, I was actually the chief
13 security officer at MySpace from May 1 of 2006 until
14 April 30th of 2010. I launched SSP Blue on May 1 of 2010.

15 Q. And what was the minimum age requirement while you were
16 at MySpace?

17 A. The minimum age requirement for the company, it was
18 started at 16. It was changed to 14 when I started there and
19 then changed again to 13 during my tenure there and it is
20 still 13 when I left. And it's actually still 13 today.

21 Q. Can you explain why they made the -- they reduced the
22 minimum age from 16 to 14 to 13?

23 A. Well, originally, the site was created with the intention
24 of appealing to high school students and then the recognition
25 came from some of the founders that they actually realized

1 high school students were also 14 and 15 and then we realized
2 that high school students can also be 13 years old but nobody
3 wanted to go below the age of 13.

4 Q. Why not?

5 A. Mostly because of the Child [sic] Online Privacy
6 Protection Act 'cause it has requirements that trigger when
7 you allow a site -- when a site says they're allowing under
8 13-year-olds to access the site, then all of the sudden
9 there's all these other requirements that you have to follow,
10 and from a company perspective, it was easier to keep it
11 from -- at 13 plus rather than go under 13.

12 Q. What kind of efforts did MySpace make to ensure that kids
13 under 13 were not on the site?

14 A. It started -- it was probably what I would call a
15 multi-tiered approach. The first step was when you're signing
16 into the site, what you have to do is register in order to use
17 it. When you register for the site, it asks you to fill in
18 your age, your birth date, your location, information about
19 yourself.

20 During that process, if the birth date that you filled in
21 comes back as under the age of 13, then the individual's
22 informed that they're not allowed to access the site and
23 that's the end of that registration process.

24 We then draft what is called a session cookie. I know
25 the Court was listening to the definition of cookie earlier

1 but we draft a session cookie on that machine so that if
2 somebody wanted to what we call back button -- in other words,
3 go back to the original page and try to do it again and change
4 the date to be older than 13, they couldn't do that, which
5 also had unfortunate other circumstances where somebody using
6 the same machine might not be able to sign up but that was a
7 decision we made and took.

8 We also ran what are called search queries on the site
9 based on text that individuals who were under the age of 13
10 were using, and what we would do is look at how people were
11 talking on the site once they were on, and if somebody was
12 saying, I'm really 11, I'm really 12, we had queries
13 triggering those types of results and then our staff would
14 look at it, make a decision on whether the person was actually
15 under the age of 13.

16 If they were, then all of their friends who had connected
17 with them were examined and their profiles were examined one
18 by one by the staffer to determine if they were under the age
19 of 13, and it was what we called a deep dive, and then we
20 would remove the original person that was identified through
21 the search algorithm and then we would remove all their
22 friends.

23 We would also -- based on communications with law
24 enforcement, we identified that sex offenders were looking for
25 children on the site who were listed as 99 years old but they

1 were doing a search on their height, their weight and their
2 age of being 99 'cause what they had identified from their own
3 discussions with children was that they were thinking 99 was
4 funny and it was a good way to get around getting onto a site
5 that said it's for 13 plus.

6 And so registered sex offenders and others had figured
7 out that's what we were doing and that's why they were looking
8 for 99-year-olds. So then we noted -- we went through that
9 entire 99 age group of which at the time I think there was 2
10 million of them. Some were actually adults who had thought 99
11 was funny. Others were kids who thought 99 was the way to get
12 in and it was in their mind cute.

13 So we did a sweep of that entire area. We stopped anyone
14 from registering who was also -- the other one was 99 -- the
15 other one was 69 actually 'cause for the jokes that are
16 surrounding the 69 number, people were using that and we went
17 through and did a sweep of that and then changed the age --
18 the highest age you could be on the site from not being
19 anything higher than 68 which, of course, led to some seniors
20 who objected but we had an explanation sent to them explaining
21 why even if they were 70 years old or 69 years old, they
22 couldn't register themselves as that and that was an
23 understandable discussion we had but we took that chance and
24 we did that.

25 We ran quite a few of -- then we also added a reporting

1 abuse feature on the site that would let us know if there was
2 an underage user. Because what we found in our own community
3 was that many, many people were using the rules and the terms
4 of service that was in the -- in the site and enforcing it
5 themselves.

6 This is something that I think even today Facebook is
7 constantly saying publicly that the community itself likes to
8 self-enforce. So we had complaints coming in from individuals
9 telling us that somebody was under the age of 13 and didn't
10 belong in the site or that somebody was under the age of 18
11 but -- but listed as an adult and, therefore, we would go into
12 that account, take action against the account and that action
13 included either deleting the person and blocking the
14 information they used to sign up or asking them to correct
15 their age, if there was a way to figure out what that was, and
16 then setting it and locking it in.

17 We also added another feature where we didn't allow
18 individuals from going from over the age of 18 to a number
19 that was under the age of 18. You could if you were 18 or
20 over change your age within the 18 or over groups. A woman
21 who was 29 years old when she turned 30 could change it back
22 to 29 'cause that was something people wanted to do; however,
23 if you were under the age of 18, you couldn't change your age
24 from 13 to 14 or 14 to 15. Once you had set an age, you were
25 locked into that.

1 We then did a sweep of all the 18 or plus category
2 looking -- informing users that if they were -- if they had
3 put in their wrong, incorrect age that this was their one
4 chance to correct it but if we found out otherwise or if we
5 identified it through our algorithms or anything else, we
6 would delete their account and they would be blocked from the
7 site.

8 Q. Did MySpace have a policy regarding sex offenders that
9 used their service -- to use their service?

10 A. Yeah. We -- Our policy was that we didn't allow
11 registered sex offenders to sign up to the site or once we did
12 identify a registered sex offender, we deleted the account, we
13 preserved the information and we provided it to the Attorney
14 General's Office of Connecticut who then I think distributed
15 whatever was relevant in different states in the 49 states.

16 Q. You probably get the gold medal for talking close to the
17 microphone but --

18 A. Oh, sorry.

19 Q. -- you may need to back out just a little bit. There's a
20 little feedback coming back with --

21 A. I'm usually sitting at counsel table when I used to
22 practice.

23 Q. And I feel like I'm eating my -- my mike as well but
24 probably need to be a little closer. What other efforts did
25 you use to protect children from predators at MySpace?

1 A. We had built trigger mechanisms which would tell us if an
2 individual after signing up on the site was attempting to
3 befriend -- who was an adult was attempting to prevent --
4 befriend people who were under the age of 18 in a fashion that
5 was abnormally high.

6 For example, sending 15 friend requests to children as
7 soon as they sign up. Sometimes we recognized -- and -- and
8 support staff would look at that because we recognized that
9 teachers may be setting up a page in order to communicate with
10 their kids and asking their kids to become friends that were
11 in their classroom.

12 We set up a requirement that if you were over the age of
13 18, in order to send a friend request to somebody under the
14 age of 18, you had to know either their last name or their
15 e-mail address. Neither of the information was available
16 publicly on the site and in essence you had to know it as
17 though you had met them in the physical world and there was no
18 other way to find that information out.

19 We separated out the 15, 16, 17 category from the 13- and
20 14-year-olds on the site -- I'm sorry, 13, 14, 15 from the 16
21 and 17 and so that there was -- cross-communication was
22 limited in one-directional instead of bidirectional.

23 We didn't allow any messaging between an adult and a
24 child until there was a friendship established and that
25 friendship could not be established unless they knew that

1 information about that individual on the site.

2 There was other things that I could think of probably
3 while I'm sitting here but...

4 Q. Can you tell me about Sentinel SAFE?

5 A. Okay. That was a service that we utilized that was
6 created by a company called Sentinel Tech Corporation, which I
7 don't think exists anymore, in Florida which had amassed a
8 database of registered sex offenders in the country and they
9 created what was called a searchable database of those
10 registered sex offenders and that database existed of what was
11 called Megan's Law so anything that was publicly accessible
12 was obtained by this company.

13 That database was sitting inside of a MySpace server
14 database where we would access it, any -- and compare
15 registered users against that database and determine if
16 somebody was a match, and then we staff ranked those matches
17 based on possibility of being precise, and then a staff member
18 would look at every single one of those and determine which
19 was a match, which wasn't a match, which didn't have
20 information on it.

21 And based on those results, we would either send --
22 either delete the account if it was a match and preserve it
23 for law enforcement or allow the account to remain or mark it
24 as incomplete information and then when more information was
25 added, we would add -- we would check it again or staff would

1 check it again.

2 Q. While you were at MySpace, did you assist in the drafting
3 of legislation regarding sex offenders?

4 A. Yes. One of them is probably relevant in this courtroom
5 today which was the e-mail registration requirements. I was
6 the person who was one of the brains behind the law itself. I
7 was -- when I was a prosecutor in the LA County District
8 Attorney's Office, I had prosecuted sex offenders, including
9 for registration violations, and one of the discussions
10 that -- that came about during our discussions with the state
11 AG's task force that was headed by General Blumenthal from
12 Connecticut at the time was can something be done in the
13 Internet space that is similar to what happens in the physical
14 space today and that is where the concept of e-mail
15 registration came about.

16 Q. Akin to what we're requiring of sex offenders in Nebraska
17 right now which is --

18 A. Correct.

19 Q. -- an e-mail identifier --

20 A. I don't --

21 Q. -- e-mail addresses?

22 A. Correct. I don't know the exact number of states but I
23 think 33 states have it. It was first introduced either in
24 Virginia or New York. Connecticut, Virginia, New York or
25 Florida, one of those states was the first to introduce it.

1 Q. Prior to MySpace, where were you employed?

2 A. I was a executive at Microsoft Corporation.

3 Q. And what did you do at Microsoft?

4 A. I started in Microsoft in July of 2002 until April of
5 2006, and when I started, I was first in the law and corporate
6 affairs department as a director of law and corporate affairs
7 but primarily responsible for four different aspects.

8 One was all company internal investigations of employees
9 for misconduct or criminal misconduct. Second was for
10 building their worldwide criminal compliance program and that
11 purpose of that program was to work with law enforcement
12 whether it was in the U.S. or any other country, anything from
13 state, local, federal, as well as agencies like the NSA, the
14 Central Intelligence -- Intelligence Agency, on information
15 that they needed from Microsoft for conduct that may be
16 involved in a criminal investigation or national security
17 investigation or a foreign law enforcement investigation
18 coming out of Hotmail, MSN, Windows Client, Instant Messenger
19 or any of the other communication services that Microsoft had
20 at the time.

21 I also was in charge of creating what's called a security
22 enforcement program where we were identifying people who were
23 hacking into customers' or Microsoft networks in order to
24 disrupt the network, plant a virus, create a worm, any types
25 of things that were happening from that perspective to figure

1 out who it was, identify the individual and then turn that
2 individual to law enforcement for prosecution.

3 I was also responsible for looking at things like
4 violations of child pornography, child predators who were
5 trying to get to people who are members of our services,
6 whether it was customers in the MSN site, in the Hotmail site
7 or in some of the groups that the individuals were using and
8 investigating those and either referring them to law
9 enforcement directly or to the National Center for
10 Missing/Exploited children.

11 I was also responsible for looking at all the content
12 that was coming into the site to demarcate content that was
13 considered illegal and content that was just in violation of
14 our terms of use and helping the company think about how to
15 handle that.

16 And then from the legal group I moved into the business
17 development and strategy group and I was responsible for
18 creating a child safety initiative that would examine how
19 Microsoft was thinking about child safety from a product
20 perspective and a business strategy perspective and
21 implementing a strategy that took child safety and put it into
22 Microsoft products across the field as opposed to having
23 different products in different divisions.

24 So Xbox was built with parental controls, Windows Vista
25 was built with parental controls, Windows Live was built with

1 parental controls, Instant Messenger was built with -- the
2 same way, Hotmail had some controls in it, and we built what
3 was called a perseverance strategy were things were similar no
4 matter what product you were using so our customers weren't
5 getting confused by different things by -- simply because they
6 were using different products.

7 I also was the director of consumer security outreach
8 whose job was to do outreach to the public in helping them
9 think about -- think about protecting themselves and their
10 family and their information, and I was going out on the road
11 and teaching individuals on how to -- how to protect their
12 family and their information in the online communities and in
13 the online world.

14 I was responsible for our non-profit connections in the
15 child advocacy community so I built relationships with groups
16 like the National Center for Missing/Exploited Children,
17 Internet Keep Safe Coalition, Enough is Enough amongst --
18 some -- Web Wise Kids, some of the other ones out there.

19 I also started what was called an international law
20 enforcement training program with the International Center for
21 Missing and Exploited Children which ended up teaching well
22 over a thousand police officers around 90 something countries
23 by the time I left all on how to investigate Internet --
24 Internet-related child predator cases or child pornography
25 cases that were taking place in either instant messaging, chat

1 rooms. At the time social networking was just in baby stages
2 so we didn't really focus on that much. And -- and e-mails
3 and web cams and Voice over IP was starting at the time as
4 well.

5 So -- I don't know. That's what I can remember right
6 now.

7 Q. Thanks. Could you explain how -- You mentioned that
8 Microsoft -- Microsoft offers instant messaging and chat room
9 services, correct?

10 A. Correct.

11 Q. And how did you make those services safer for children at
12 Microsoft?

13 A. We did -- we added several things that are actually being
14 used by most of the industry or many of the industry has
15 adopted since then, especially the -- the major players in the
16 industry. In the instant messaging site, we -- we connected
17 those where parents could determine whether or not -- where
18 they would be notified if a individual was added to their list
19 of contacts, what was called a buddy list by AOL or a contact
20 list -- every company used a different term for it but in
21 essence the list of people they were communicating with and
22 they could be notified.

23 They could ask -- they could block it. They could set it
24 up so that they have to give permission for that. We had a
25 report abuse button at the bottom of it, and during a

1 conversation inside a window, an individual could click that
2 button and report that individual and then it would be
3 reviewed by our support staff.

4 And all our support staff was working 24/7 whether it was
5 inside the company or outsourced to a vendor. And in the chat
6 rooms, we often had people who were monitoring chat rooms, in
7 other words, actually inside the chat room during the
8 conversation, and if any type of activity was going in
9 directions that wasn't appropriate or was illegal, it would be
10 reported. If it was illegal, it would be -- an action would
11 be taken against the person if it was considered inappropriate
12 or in violation of terms of use in other types of ways.

13 And illegal activity could be anything from somebody
14 searching for child pornography, it could be somebody
15 looking -- who's an adult looking for places that they could
16 meet under 18-year-olds, sometimes under -- under 13-year-olds
17 or under 12-year-olds or under whatever the age group that
18 person may be looking for.

19 We invited law enforcement to the campus -- Microsoft
20 campus, and we sat down with them to understand how Internet
21 child pornographers and Internet predators were using our
22 services trying to gain access to children and then we tried
23 to enter -- educate our own customer service staff and our
24 support staff on ways to identify that kind of conduct or to
25 go into places and use key words to find rooms that were being

1 created -- chat rooms were creating [sic] for that purpose and
2 then either block the rooms or ban the naming of those rooms,
3 and we created a list of terms that would be banned so that
4 people couldn't -- it would be harder for them to create rooms
5 like that, and when it was harder, the goal was eventually
6 they would either go somewhere else or not do it.

7 Q. Prior to Microsoft where were you -- where were you
8 employed?

9 A. I was the vice president of worldwide Internet
10 enforcement at the Motion Picture Association of America, and
11 I was hired during the time when -- in August of --
12 August 30th of 2000 is when I started -- or August 28th, I
13 can't remember the exact date, and I left on June 21st of
14 2002.

15 And I was brought in to build their worldwide Internet
16 enforcement department whose job was to try to find movies
17 that were being pirated in the Internet space around -- around
18 the world for the member companies which was MGM at the time,
19 Paramount, Disney, Warner Bros., Sony -- Sony Pictures, and
20 Fox was the other one.

21 Q. How did your work at MPA enhance online child safety?

22 A. What we did was during the process we -- we worked with a
23 lot of outside companies to identify some of the technology
24 that they had in order to identify Internet movie files, and
25 during the process of identifying Internet movie files using

1 the technology that we implemented, we were finding that
2 individuals were hiding their child pornography movie files
3 inside of pirated movie files so that they wouldn't be
4 detected by law enforcement.

5 And when we recognized this trend, we sat down with the
6 FBI, we sat down with the Internet Crimes Against Children
7 Task Forces, especially the one in the -- in the LA field
8 office, and figured out how to create a reporting mechanism.
9 We trained our staff on how to spot movie files that might be
10 doing something like this and we made referrals -- what were
11 called referrals to law enforcement. In other words, we
12 preserved the information, we tried to identify where that
13 file was being posted from, we identified the IP address, the
14 Internet Protocol address, of that file for law enforcement,
15 and any other information that could be used in order to
16 identify who the individual was behind it and then we made
17 package referrals to law enforcement.

18 We also trained law enforcement in the FBI community and
19 the federal, state and local community, especially in LA -- in
20 Los Angeles, how to investigate Internet crimes related to
21 movie piracy but in the process how to investigate crimes
22 related to Internet predators and Internet movie files -- or
23 of child pornography.

24 Q. Prior to the MPAA where did you work?

25 A. I was the -- what was officially called the trial

1 attorney but most people call the federal prosecutor in the
2 U.S. Department of Justice in Washington, D.C. in the criminal
3 division and inside the criminal division is the child --
4 child exploitation and obscenity section and then later the
5 computer crime and intellectual property section.

6 Q. What kind of crimes did you prosecute while at USDOJ?

7 A. When I first started there, which was April of 1997 and I
8 stayed there until August of 2000, I was in the child -- child
9 exploitation and obscenity section, CEOS was the nickname for
10 it. I was brought in as one of their first Internet crimes
11 against children prosecutors.

12 I was responsible for working with law enforcement to
13 prosecute Internet-related child predators or Internet-related
14 child pornography. I was also responsible for trafficking of
15 women and children cases that were coming in from outside the
16 country inside the United States for prostitution or other
17 (unintelligible).

18 Q. While you were prosecuting those crimes against children,
19 did you notice a pattern that predators use to groom their
20 victims?

21 A. Well, I mean, I think before I answer that one of the
22 things that I ended up doing was working very closely with the
23 FBI's -- what was called the Innocent Images Project and that
24 project was specifically created to create undercover
25 operations where the Federal Bureau of Investigation would

1 work with the state and local officers as well as Secret
2 Service and other agencies, and that's when the Internet
3 Crimes Against Children was originally launched, and then I
4 trained the first set of Internet Crimes Against Children Task
5 Forces in how to investigate Internet crimes, how to identify,
6 how to figure out what predators were doing.

7 And what -- and during the prosecution and during that
8 time frame, what we learned was the process of a Internet
9 predator of meeting a child in the Internet space was very
10 similar -- and then eventually meeting them in the physical
11 space was actually very similar to what happens in the
12 physical world where they go through what's called a grooming
13 process, and the grooming process is essentially creating a
14 relationship with a child and a relationship in which every
15 time a child feels like they need someone to talk to, the
16 person is there, anytime the child feels like that they're --
17 things aren't going their way, they're there to inspire them.

18 The understanding of the children's world, in other
19 words, what kind of bands they're in, what music that they
20 like, what kind of clothing is really the in clothing nowadays
21 and having those conversations and having the ability to have
22 that conversation. The person would strike up a relationship
23 in which case a quote/unquote relationship would be existing
24 as opposed to a stranger meeting a stranger -- a stranger
25 child and all of the sudden a physical-world occurrence

1 occurred.

2 That process could sometimes run for one week, it could
3 run for two months, it could run for six months with the
4 ultimate goal of being -- of creating a physical world
5 encounter where the predator would eventually say I'd like to
6 meet with you and then send a bus ticket if the person was
7 living far away or choose a location, whether it was a mall,
8 it was a motel room or wherever that location was eventually
9 to lead into a private encounter that would be of an illegal
10 nature.

11 Q. Is there -- in your experience is there a particular type
12 of child that sex offenders targeted?

13 A. Interesting -- I mean, this is -- this was something
14 that -- I think four different research studies have been done
15 now but each one concluded with something similar which was if
16 a child was what is considered at risk in the physical world,
17 they were also considered at risk online as much as they were
18 in the physical world, and from the cases that were -- that we
19 prosecuted, what we found is that the child who was led into a
20 grooming situation almost always was an at-risk child in the
21 physical world to begin with.

22 So it was a child who was seeking attention who didn't
23 have what their -- their needs weren't being met at home, they
24 were having trouble in school of some kind, they were -- they
25 were in a relationship situation in school where they felt

1 like they didn't have enough friends or -- or they didn't
2 belong to the right type of crowds or something was going on
3 in their child's life that was leading them to be vulnerable
4 to a predator situation.

5 Q. Prior to USDOJ where were you employed?

6 A. Well, after the child online -- child exploitation
7 section, I went into the computer crimes section and I
8 prosecuted computer crime cases. During this four -- three-
9 to four-year tenure, I also taught at the -- actually taught
10 at the State Attorney General Academy and I think it was
11 Missouri or Mississippi -- I don't know which state and I hope
12 I don't offend them but it's one of the two.

13 I also taught at -- in South Carolina at the federal
14 academy on how to do Internet cases and then prior to that I
15 was a prosecutor in the Los Angeles County District Attorney's
16 Office.

17 Q. What do you mean by taught them how to do Internet cases?

18 A. So one of the things I -- I did quite a bit of was
19 identify inside the Internet industry when I was in the
20 government experts who were experts in how news groups
21 operate, how chat rooms work, how instant messenger programs
22 work, how e-mail works and then -- and then how things are
23 done in the back end, in the front end, in other words, what
24 does the customer see versus what's happening in the back end,
25 and then help law enforcement figure out what type of data is

1 going to be useful to locate and target an individual who's
2 using one of those services to commit a crime, what type of
3 laws would be useful in order to prosecute whether it was a
4 child pornography law, a child enticement law, whether it was
5 better to do a federal prosecution or a state prosecution or a
6 local district attorney prosecution, how to get information
7 preserved.

8 I also worked with the forensic teams on how to identify
9 inside the hard drive of a computer where to look for
10 information that would tell you what an offender was doing so
11 that that case would be brought to court, which cases would be
12 worth bringing, which cases really didn't have prosecutable
13 information in them.

14 I also looked at -- I also worked a lot with the private
15 sector in trying to figure out the best way for the law
16 enforcement community to work directly with the private sector
17 community all within the bounds of the law, especially the
18 Electronic Communications Privacy Act. I also was a technical
19 advisor to the Child Online Protection Act Commission, what's
20 actually called the COPA commission, and -- which is separate
21 from the Child [sic] Online Privacy Protection Act. A lot of
22 people actually confuse the two. One is the COPPA. The other
23 is COPA. I don't know how the court reporter's going to write
24 that down.

25 Q. When -- So then prior to DOJ you were at the Los Angeles

1 DA's Office?

2 A. Yes, the Los Angeles County District Attorney's Office.

3 Q. And what kind of cases did you do there?

4 A. I started in juvenile court where I prosecuted juvenile
5 offenses, anything from misdemeanors to felonies that included
6 murders and gang murders and child exploitation. Then I
7 spec- -- then I was inside the -- what was called the sex
8 crimes unit which handled all adult sex crime prosecution as
9 well as all child prosecutions and that included child
10 molestation, child abuse, baby murders and adult rapes, adult
11 sexual assault and anything gang related that had a sexual
12 component to it.

13 Q. Crimes involving the Internet?

14 A. At the time -- this was -- I was there from 1990 until
15 1997 and AOL had just started which was actually why I was
16 recruited by the Justice Department but we had one crime
17 involving the Internet which at that time in 1996 we didn't
18 know how to handle it so we referred it to the federal agency.

19 Q. Who then recruited you to --

20 A. And then eventually I was asked to join the Justice
21 Department in Washington, D.C.

22 Q. Were any of the sex offenders that you prosecuted at the
23 D -- DA's office reoffenders?

24 A. Yes, quite a few of them were.

25 Q. In your experience how soon after committing a first

1 offense would a registrant reoffend?

2 MR. DAHLQUIST: Objection as to relevance, Your
3 Honor.

4 THE COURT: That question is so broad that I think
5 I'll -- I'll sustain it. If you mean a sex offender as
6 defined in this statute, that's pretty broad and -- and that's
7 really my concern. Now, if you want to narrow it, I suppose
8 that's a different issue but I'll leave that to you.

9 BY MS. SPOHN:

10 Q. Were sex offenders subject to -- that -- the type of sex
11 offenders that are subject to the Sexual Offender Registration
12 Act in Nebraska and particularly the ones that would have
13 committed crimes against children and been prohibited from
14 using the site under the new crime 28-322.05, in your
15 experience in prosecuting individuals that would have
16 committed those sort of crimes, did they commit -- did they
17 reoffend?

18 MR. DAHLQUIST: I'm going to object to relevance
19 again, Your Honor. And I'm going to object on foundation.
20 The witness hasn't testified to any knowledge --

21 THE COURT: I think that'll be sustained too.
22 There's -- I know just a little bit about this and there's a
23 great debate, for example -- the empirical evidence is not at
24 all clear in my judgment when -- about possessors, for
25 example, of -- well, in the federal system of -- of mere

1 receipt cases about whether -- what the recidivism rates
2 really are.

3 Now, if we're going to talk about something else, that's
4 a different question but even that provision of the statute
5 is -- is awfully broad so that's why I'm sustaining it.

6 To be clear I don't think anybody disputes the fact that
7 the issue of recidivism is a enormous concern with respect to
8 offenses against children but the parameters of recidivism I
9 think everyone also agrees change pretty dramatically
10 depending upon a number of factors that are not implicit in
11 your question and so that's why I'm sustaining it. It just
12 frankly wouldn't help me very much to have that answer because
13 the question's so broad.

14 Go ahead.

15 MS. SPOHN: Thank you, Your Honor.

16 BY MS. SPOHN:

17 Q. Mr. Nigam, can you give us a little bit about your
18 education -- tell us about your educational background.

19 A. You mean schooling?

20 Q. Education, yeah, your -- what you did -- your degrees.

21 A. Oh, I have a bachelor of arts in political theory in
22 government from Wesleyan University in Connecticut and I have
23 a law degree from Boston University School of law, graduated
24 in 1990.

25 Q. Let's turn now to your expert report. In there you

1 explain how enforcement of the statutes would actually impact
2 sex offenders required to register under SORA, correct?

3 A. Correct.

4 MS. SPOHN: May I approach?

5 THE COURT: Yes, and you may have continuing leave.

6 BY MS. SPOHN:

7 Q. I'm showing him what's been marked --

8 MS. SPOHN: Judge, do you want a copy?

9 THE COURT: Is this his vitae?

10 MS. SPOHN: I'm sorry?

11 THE COURT: Is this his curriculum vitae?

12 MS. SPOHN: Yes, it is.

13 THE COURT: I don't need to see it. I've seen it.

14 Thank you.

15 MS. SPOHN: Okay. It's actually his expert report
16 and his vitae's attached to it.

17 THE COURT: It's okay. Go ahead.

18 MS. SPOHN: Okay.

19 BY MS. SPOHN:

20 Q. I'm showing you what's been marked as Defendants' Exhibit
21 305.

22 A. Uh-huh.

23 Q. Is this the copy of your report?

24 A. Yes.

25 Q. Did you draft this report?

1 A. Yes.

2 Q. Is this a true and accurate copy of your report?

3 A. Yes.

4 MS. SPOHN: Your Honor, at this time we'd offer
5 Exhibit 305 into the evidence.

6 MR. DAHLQUIST: No objection, Your Honor.

7 THE COURT: It's received.

8 BY MS. SPOHN:

9 Q. Let's start with an overview of what's required by sex
10 offenders to be produced under the Statute 29-4006(1)(k) and
11 (s).

12 MS. SPOHN: If we can put it up on the screen.

13 THE COURT: Sure.

14 MS. SPOHN: You want to turn that so we can see it.

15 UNIDENTIFIED MALE VOICE: (Unintelligible.)

16 A. I have (k) up here. Is that what you want?

17 BY MS. SPOHN:

18 Q. Okay. You can see it up there? Great. Now, let's start
19 with the first type of information. Include serial numbers,
20 telephone numbers and account numbers, correct?

21 A. Do you have but not limited to U -- G-U-I-D, serial
22 numbers, IP addresses, telephone numbers?

23 Q. Correct.

24 A. Yes.

25 Q. And I believe IP addresses are -- are no longer at issue

1 here as are -- as with GUID'S. So serial numbers, telephone
2 numbers and account numbers.

3 A. Correct.

4 Q. Right?

5 A. Yes.

6 Q. Where's the serial number for a communication device
7 located?

8 MR. DAHLQUIST: Objection, Your Honor. It doesn't --
9 the question doesn't identify which electronic
10 communication -- I mean, there's a myriad of different devices
11 that fall under that.

12 THE COURT: That'll be overruled. Go ahead.

13 A. It depends on the device but almost always you look at
14 the bottom of the device. You turn it over. Like on your
15 laptop, if you turn it over, you'll see yours.

16 BY MS. SPOHN:

17 Q. How about on my cell phone?

18 A. That depends on the cell phone. Usually, you open the
19 back where the battery is, take the battery out and it's
20 listed under there.

21 Q. The regis- -- registrant must also provide their phone
22 numbers and account numbers for their remote communication
23 devices, correct?

24 A. Correct.

25 Q. How would those numbers assist law enforcement?

1 A. Well, all of these numbers are numbers that -- if law
2 enforcement -- if -- for example, if you're -- if you're an
3 offender, whether it's registered sex offender or not, but
4 just if you're an individual trying to connect with a under 18
5 individual for illegal purposes, during undercover operations
6 or oftentimes law enforcement will get a complaint from a --
7 usually a mother of a victim who's identified that something
8 is happening with an adult and there's a telephone because
9 that's coming through a text message or they've actually
10 talked on the phone and she's gone through the phone calls
11 made by the child and they find a number, then law enforcement
12 will take that number, subpoena the company that owns that
13 telephone number and figure out who the owner of the account
14 is.

15 Is that --

16 Q. But if this --

17 A. -- is that your question?

18 Q. -- but if this information was at the ready of law
19 enforcement, they wouldn't have to go through the subpoena
20 process?

21 A. Well, if that information was provided to law
22 enforcement, they can also search databases of other law
23 enforcement which we asked our investigators to do on every
24 case that we had was check certain databases to see if there's
25 another agency already investigating that.

1 In fact, at Microsoft we created a program specifically
2 to help law enforcement have a place to put their data in
3 Internet Crimes Against Children investigations so that they
4 could cross-reference. So, for example, if the customs
5 department in Virginia was investigating a case and had a
6 telephone number as part of their case, hadn't gone further
7 than that but it was one of those that came in, the FBI office
8 in Los Angeles using the same software could then do a query
9 on it, identify that there's a customs agent working on it,
10 then share information and then make it easier to target a
11 person who is behind some sort of Internet Crimes Against
12 Children case.

13 Q. But let's -- let's move on to 1(a) -- 1(s) then. It
14 talks about requiring disclosure of e-mail addresses and --
15 and identifiers.

16 A. Uh-huh.

17 Q. What's a -- what's a real-world analogy to an identifier?

18 A. Well, what happens -- Are you talking about where it
19 says instant messaging identifier --

20 Q. Chat --

21 A. -- chat room -- any of those?

22 Q. Correct.

23 A. Okay. When you're going to use an instant messaging site
24 or a chat room site, companies ask you to create an identifier
25 and this way a company knows, number one, who you are 'cause

1 it's asking to -- basically asking you to register, and once
2 you're registered, then they collect certain information about
3 you.

4 Some companies will register with a lot of information.
5 Other companies will require limited information but it makes
6 that person unique so that when they're in a room and they're
7 talking in a chat room, for example, then the list of people
8 who are listed -- if you're one of those people, your chat
9 room identifier will be there and people can talk to you.

10 If you're doing instant messaging, that will persist with
11 you as long as that -- you're using that client. Most
12 companies won't let you change the primary one 'cause that's
13 now tied to information about you and that allows
14 communication to happen between one person that you're instant
15 messaging with to another person. And so those things are
16 almost always chosen by the individual who's actually using
17 that chat room or using that instant messaging service.

18 THE COURT: Counsel, before you leave this, I'm
19 interested in the difference, if there is any, between instant
20 messaging and SMS texting.

21 MS. SPOHN: Go ahead.

22 THE COURT: No, ma'am. I don't ask the questions.

23 MS. SPOHN: Okay.

24 THE COURT: I just -- I give that to you for
25 whatever -- I might ask it afterwards but I don't want to

1 interrupt your direct but if this is a convenient place and
2 you care to ask the question, that would be helpful to me.

3 MS. SPOHN: What? What is the difference between
4 instant messaging S -- and SMS texting? Is that what your
5 question was?

6 THE COURT: Yes, that is my question.

7 THE WITNESS: I think probably the easiest -- can I
8 ask the Court for some leeway to talk?

9 THE COURT: Sure.

10 THE WITNESS: Okay. Probably the best way to think
11 about really all of these is to look at it from a
12 physical-world perspective. When the Internet was being
13 created, one of the things that people were trying to do was
14 try to create what's happening in the real world, and so when
15 e-mail was being created, which is one of the original ones,
16 the whole concept behind it was when you go into your mailbox
17 in the physical world, you go to a place, mailman knows where
18 to deliver a letter that comes, say, from the court to myself.

19 An e-mail was the same idea. Let's have a place -- an
20 address that we know belongs to the court, an address that
21 belongs to me, and when you want to send me something, you put
22 my address on it and I will eventually go to my mailbox and I
23 will get it so that's how e-mail was created.

24 Then the concept became, well, how do we make that
25 faster? E-mail was fast but let's make it even faster. So in

1 the wireless community, there was a texting created, and these
2 things all are using different language or what's called
3 different protocol, and that's why -- SMS is one type of
4 protocol. SMTP is the simple mail transfer protocol that's
5 used for e-mails.

6 There's different protocols for instant messaging.
7 There's a different protocol for chat rooms. Some are what's
8 called web-based. In other words, they're using the WWW, the
9 World Wide Web, protocol. All that really means is it's
10 talking a different language that lets people who talk that
11 language talk to each other. All right?

12 So, in other words, if you're chatting with somebody in
13 one language, somebody who's using Instant Messenger cannot
14 all of the sudden decide they're going to become chatters
15 using chatting language 'cause they're not talking that
16 language and they have been designed not to do that.

17 So the text messaging is something that happens through a
18 different kind of SMS, what's called an SMS protocol.

19 Now, they also use MMS. You may see that on your -- I
20 don't know if you have an iPhone or an Android phone but when
21 you see that -- when you send a photograph, it all of the
22 sudden transfers it to an MMS message as opposed to an SMS
23 message. In essence it's nothing more than -- instead of
24 passing text, you're passing a picture file or a video file.

25 Now -- and then comparing that to an instant messaging,

1 what happens in the instant messaging system in the background
2 is you have an address, I have an address, and instead of --
3 for that -- for you to communicate with me, it becomes a
4 direct communication. You know what my address is on the
5 Internet, I know what your address is so when I send -- you
6 send me something, it doesn't have to go to some other
7 company's server space and have them pass it to me. It goes
8 directly to me and that -- that becomes an SM- -- or that
9 becomes an instant message.

10 And it's called instant because even though, you know,
11 people can say it'll take two seconds or it'll take half a
12 second, the fact is that I don't have to do anything. I
13 know -- you hit send, I get it on my machine, I see it in
14 front of me whereas in mail I actually have to go somewhere,
15 go get it, open my mail, log into my mail, pull it out or
16 download it.

17 Oftentimes you'll be on the phone with somebody, for
18 example, and you'll be saying, I didn't get your mail, I
19 didn't get your mail, and they'll say to you, hit
20 send/receive, hit send/receive. It's another way of saying go
21 check your mailbox, go check your mailbox.

22 Now they've changed that mail and evolved it even more
23 because people are so obsessed with getting things almost in
24 real time that it's doing it for you. The machine is actually
25 set up -- for example, I've set my machine to check mail every

1 one minute. Every one minute -- Government machines when I
2 was in the Justice Department were set to 15 minutes which
3 annoyed all the prosecutors 'cause they would get a whole
4 bunch of e-mails and nothing would happen for 15 minutes and
5 then you'd get a whole bunch of e-mails or you'd send an
6 e-mail and that person on the other end would be calling you
7 and saying, I didn't get it, I didn't get it 'cause it was set
8 for 15 minutes by the government and you couldn't change it
9 'cause you didn't have the rights to do that.

10 I don't know if I'm answering your question but that's...

11 THE COURT: Well, since I've interrupted I'll
12 continue to interrupt. I still don't see the difference
13 between the text and an instant message -- SMS text. I
14 realize that they're -- they may be utilizing different
15 language.

16 THE WITNESS: From a practical point of view, that is
17 probably -- maybe that's your question?

18 THE COURT: Yeah.

19 THE WITNESS: If -- the -- A text message goes to a
20 company that then delivers it to you.

21 THE COURT: Right.

22 THE WITNESS: An instant message goes to you.

23 THE COURT: Yeah. But you're always --

24 THE WITNESS: So the company steps aside.

25 THE COURT: Even though --

1 THE WITNESS: Once a connection -- I'm sorry.

2 THE COURT: But even with an instant message, you're
3 always going through the server of the provider, aren't you?

4 THE WITNESS: Not in an instant message.

5 Originally -- once the communication -- once the accounts are
6 set up --

7 THE COURT: Yeah.

8 THE WITNESS: -- the provider says you know that
9 address -- this is your address and -- and I have my address.
10 The provider steps aside and lets that communication take
11 place directly whereas in a text message the provider stays in
12 the middle of that transaction.

13 E-mail, the provider stays in the middle of that
14 transaction but goes even further than that. It holds the
15 communication that was sent until somebody on the other side
16 decides to go get it.

17 If you -- if you compare it to the phone world, when the
18 phones originally started, you would call someone and they
19 would -- the operator would pick up, figure out what line,
20 they would plug it into the next line and they would take
21 place of being in the middle of it, right?

22 Now days, it goes into a place -- the phone company says,
23 Oh, I'm calling the court, and then it would make that
24 transmission happen and it would still be in the middle of the
25 process. It always stays in the middle of that process.

1 THE COURT: Thank you.

2 Go ahead, counsel. Thank you for accommodating me. Go
3 ahead.

4 BY MS. SPOHN:

5 Q. Of course, we'll -- we'll continue on the instant
6 messaging definition. If we can put that term up on the site.
7 In the meantime, can you give me -- what's the real-world
8 equivalent of an instant message?

9 A. It's -- if I asked you to step outside and just talk to
10 you privately and nobody else listening, I would be instant
11 messaging with you.

12 Q. And how is that different than a chat room?

13 A. In a chat room what happens is the company who owns the
14 feature of the chat creates a space often called a room, and
15 in that space it allows people to come into it, and when I
16 type something on my machine and hit send, it shows up. In
17 other words, everybody hears what I just said. The next
18 person who speaks and they hit send, it shows up on my screen
19 and I can read what they said.

20 It's very similar to -- let's say you go to a party or,
21 actually, if you take this courtroom, if there was a rule that
22 we could all talk and, you know, not have to just be whoever's
23 on the stand and whoever's asking questions, we would -- we
24 could become a chat room. We could be sitting here talking to
25 each other and if one of us wanted to have a private

1 conversation, sometimes chat rooms allow you to have that
2 private conversation but all of it is being maintained by the
3 company that provides the chat services.

4 There is a place in some location inside those company
5 servers that are allowing all of that connections to take
6 place. That company knows who each of the people is connected
7 to that particular room. It knows the information -- what IP
8 address they're collect -- connecting from, in other words,
9 what place on the Internet have they connected and from there
10 came into that room, and it maintains all that.

11 It can keep it forever or it can delete it. It can do
12 whatever it wants with it but that company controls that
13 information, owns that information and -- and provides that
14 space for that to occur.

15 Q. If you look at the statutory definition of instant
16 messaging, number 10 there, it talks about "direct" and
17 "dedicated".

18 A. Okay.

19 Q. Plaintiffs' expert said that that substantially restricts
20 the -- the -- what qualifies as instant messaging here. What
21 do "direct" and "dedicated" -- what does "direct" and
22 "dedicated" mean to you?

23 A. It means that nobody else can listen. I mean, that --
24 from an industry point of view, the whole purpose of instant
25 messaging was created because people wanted to talk to

1 somebody else privately without waiting for that whole e-mail
2 process to take place.

3 E-mails were one to one or one to many but you still had
4 to send it and wait for them -- that person to check their
5 mailbox and do things like that so there was a lot of pressure
6 to make that go even faster until somebody came up with the
7 concept of instant messaging.

8 Now what happens is my location on the Internet is
9 identified using instant messaging protocols, your location is
10 identified and that instant messaging protocol is often
11 proprietary to the company. So Microsoft created one called
12 Instant Messenger. Google just created one called Google
13 Talk. Yahoo created one called Yahoo Messenger.

14 And then even a company created one that allowed all of
15 those different languages -- as I was telling the Court, all
16 of those languages to be translated into one language so a
17 company called Trillian created one where you could be using
18 Yahoo, AOL and Microsoft's messenger product and still
19 communicate directly with somebody using a different product
20 'cause they did the translation for you but it's all different
21 languages that allow that communication between myself, for
22 example, and you to happen where I type and you don't have to
23 do anything to receive it. The moment I hit send, you see it
24 on your screen and it's delivered directly to you.

25 Q. Turning now to the definition of chat room -- well, can

1 you give me an exam- -- give an example of a chat room?

2 A. Yeah. Yahoo provides a lot of chat rooms. AOL provides
3 chat rooms. A lot of companies provided those types of
4 services.

5 Q. If you look at the definition which is number three here,
6 does that conform with the industry's use of the term?

7 MR. DAHLQUIST: I'm going to object on foundation,
8 Your Honor, and form of the question. I don't know what
9 industry we're talking about and there could be subsets of
10 that industry. I don't know what the question's trying to do.

11 THE COURT: Would you restate it for us.

12 BY MS. SPOHN:

13 Q. Looking at the definition and in -- in number three
14 there, does that term conform with your understanding of the
15 term -- your understanding of the use of the term?

16 A. Yes. And -- and my understanding actually comes from
17 having spent -- I mean, I've worked with probably every major
18 Internet industry in this country and many of them around the
19 world and that's because I was part of the Internet Service
20 Providers Association, one of the people in the original
21 organization when it was first created, and that included
22 Microsoft, Yahoo and today includes Google as well and
23 included many of -- ISP's that originally -- today don't even
24 exist anymore but the discussions in those groups were all
25 centered around how to work in the chat room areas, instant

1 messaging areas, the e-mail areas and all the different
2 communication protocols that we had, how to work with law
3 enforcement, how to determine what kinds of policies to set in
4 those, how to determine what kind of information to keep, what
5 kind of challenges the different companies were having.

6 For example, in the chat room were people experiencing a
7 lot more use of it by Internet predators versus by instant
8 messaging devices and there was a lot of sharing happening.

9 I was also part of the Justice Department's Internet
10 Industry Task Force that was created specifically to analyze
11 all of these areas and during all of these discussions, we
12 never had actually a single instance where somebody said I
13 don't talk about chat rooms the same way you talk about chat
14 rooms.

15 I mean, it was something that if somebody said chat room,
16 we all knew what we were talking about. If somebody said
17 instant messenger, everybody knew what type of product in
18 their company that referred to.

19 Q. Are there chat rooms that use cellular telephone
20 platforms?

21 A. I don't quite understand.

22 Q. If I were to use a chat room on my cell phone, would
23 those be excluded under this -- under this definition?

24 A. Not -- not in my opinion, no.

25 Q. Does -- I think if you look at this statutory definition,

1 it talks about web site or server space. Does that
2 (unintelligible) to be (unintelligible) restrict the actual
3 number of prohibited chat rooms?

4 A. What it does, it says that chat rooms that are using the
5 World Wide Web protocol for the web site and server space is
6 really where a chat room sits so it's actually saying if a
7 chat room -- it's -- it's almost redefining what a chat room
8 is in a particular server space.

9 You asked about cell phones. From a perspective -- a
10 cell phone -- I think probably I should -- I want to try to
11 make sure we're clear on this because people talk about cell
12 phones but if you look at the market out there, you have cell
13 phones and you have smartphones. You have phones that only
14 allow you connections for making a phone call. Say, I make a
15 phone call to this courtroom on a cell phone that has no
16 ability to connect to the Internet.

17 If I have a phone that has the ability to connect to the
18 Internet, I'm actually walking around with a minicomputer and
19 a cell phone connected under one little package. An iPhone is
20 what Apple calls it. An Android is what some of the other
21 companies have called it. Sprint has its own.

22 Everybody's creating their own smartphones, and that's
23 the reason why they've been nicknamed smartphones 'cause you
24 can allow -- you can use it to text message, you can use it to
25 instant message, you can use it to make a phone call and you

1 can use it to connect to the Internet or to surf the web. You
2 can use it for videos. You can use it for taking pictures.
3 So it has different types of things that people were doing in
4 their everyday lives put into one little box, create -- shrunk
5 into a teeny package that fits into your pocket.

6 So from a perspective in the real world, it used to be
7 you would have to take out your digital camera or your SLR
8 camera in order to take pictures. You would have to go get a
9 video camera to take videos. You would have to go to your
10 desktop or your laptop to go connect and use your e-mail or go
11 connect to the Internet.

12 You would have to pick up a different device whether it
13 was your home landline or your cell phone to talk on the
14 Internet -- or, I'm sorry, to talk on a phone and now peep- --
15 companies have figured out how to shrink it enough so that all
16 fits into one device and just use that one device for all the
17 different areas.

18 So when you're actually using a chat room, you're not
19 using the cell area. You're using a platform that has an
20 operating system on it that specifically was designed to be
21 able to work in this little teeny device like an iPhone and
22 then you're using that to connect to a chat room service that
23 might be sitting on the web or is through an application that
24 a company has created specifically for chatting purposes.

25 Q. So you're using the Internet basically, just on a

1 smartphone?

2 A. Right. You would have to connect to the Internet. So,
3 for example, if you took your iPhone and you put it in
4 airplane mode, it cuts off your wireless connection, it cuts
5 off your Wi-Fi as well as your wireless site and you can't
6 connect to the Internet, you can't use any of that
7 communication device.

8 Q. Okay. Could posting comments on a web page or blog be
9 considered a chat room?

10 A. No.

11 MR. DAHLQUIST: I'm going to object to the form of
12 the question and -- I don't know if we're talking about per
13 the definitions or as Mr. Nigam's understanding of the terms
14 or -- or how the contours of that question are shaped.

15 THE COURT: Are -- are you asking within the context
16 of -- of the statute?

17 MS. SPOHN: Yes, Your Honor.

18 THE COURT: Of the statutes at issue here?

19 MS. SPOHN: Yes, Your Honor.

20 THE COURT: With that understanding the objections's
21 overruled.

22 You may answer, sir.

23 A. Say -- What was your question again?

24 THE COURT: Could posting something on a blog be
25 involving yourself in a chat room as you understand the

1 definition of chat room within the provisions of Nebraska
2 Revised Statute umpty, umpty, ump here?

3 THE WITNESS: Okay. No, it would not be.

4 BY MS. SPOHN:

5 Q. Why not?

6 A. Well, a blog is specifically -- even the way this -- this
7 definition is written, it is a place where you go and -- it's
8 almost like in the physical world setting. A blog is very
9 much like -- you know those kiosks that especially
10 universities have where you -- used to be a bulletin board and
11 now it's more called a blog where you post something and then
12 everybody can come in there and look at it, and if somebody
13 else wants to post something, they have to go there and write
14 whatever they want on it, and if somebody else wants to do it
15 and that happens -- which is very different than a chat room
16 where somebody types something, hits send, it shows up
17 immediately and somebody else sees it immediately and -- I
18 mean, in a blog the owner of that blog can actually decide who
19 gets to upload it, if it's going to go through, if it's going
20 to be visible to anyone, if it's going to be sitting in a
21 holding pattern until the blog site owner decides that it's
22 acceptable for display to anybody else. A chat room doesn't
23 work like that.

24 Q. Would e-mail fall under the statutory definition of a
25 chat room?

1 A. No.

2 Q. Why not?

3 A. 'Cause e-mail is something where -- first, number one, it
4 speaks a different language going back to the protocol.

5 Number two, when you send an e-mail, I send it to a particular
6 address that is tied to that protocol and then it's only to
7 that person or persons and then you have to go and pull it.

8 It's just -- I mean, it's almost like all of these
9 different things are -- one's an apple, one's an orange, one's
10 a watermelon and one's a, I don't know, papaya.

11 Q. Let's -- let's go to the definition of social networking
12 site now. But while he -- while Kevin's doing that, can you
13 give us an example of a social networking site?

14 A. MySpace probably is the most obvious and Facebook is the
15 other one.

16 Q. And what's a real-world equivalent of a social networking
17 site?

18 A. A social networking site is -- was formed around the
19 concept from the real world of what people do as humans which
20 is socialize. They like to share their photos. They like to
21 make new friends. They like to connect with people. They
22 like to comment on each other's photos. They like to use
23 their friends to meet new friends of their friends so it takes
24 all of those concepts and tries to create a location on a
25 single platform where a community can be formed where people

1 can do all those types of things.

2 Q. Turning now to the definition on subparagraph 13 there,
3 does that statutory language -- does that definition conform
4 with your experience in -- in working at Microsoft and -- and
5 at MySpace and -- and -- does that conform industry's use of
6 the term "social networking site"?

7 A. Yes.

8 MR. DAHLQUIST: Your Honor, I'm going to object on
9 form and foundation to the industry. We don't know what
10 industry we're talking about, Your Honor, and which subset of
11 that industry or...

12 THE COURT: That'll be overruled. You may answer. I
13 think his answer was yes and now you probably want to have
14 him -- would you explain the basis for your answer.

15 BY MS. SPOHN:

16 Q. Can you explain -- explain the basis for your answer?

17 A. Yes. Some of it is from direct -- directly from my
18 experience at MySpace and when we were looking at the site all
19 the different features that we looked at, and every time we
20 had meetings to determine what would be the next feature we
21 would add, it was always tied to what do people like to do, is
22 there a way we can create that physical experience and
23 integrate it into the online experience.

24 Those discussions even happened in the safety space where
25 if we couldn't solve that real-world translation to the online

1 world, we would look at other avenues to either not allow it
2 or to create a different thing that would feel like it was the
3 same.

4 I was also part of -- when I was -- I was actually one of
5 the founders of the Internet Safety Technical Task Force at
6 the request of the state attorney's general and that task
7 force was specifically to study social networking sites and
8 safety around it, and one of the primary discussions that we
9 engaged in in almost I think the first one to -- I believe the
10 first, second and third meetings was how do you define social
11 networking sites and what is included and what is -- what is
12 excluded, and all of these things were things that were
13 included in the definition of a social networking site. I --
14 I was actually pointing to section 13.

15 Q. So is there an easy way to identify a social networking
16 web site?

17 A. Well, I mean, an -- yes. Number one, you have to
18 subscribe and -- and in a real-world setting, it's either
19 you're invited to the party or you're not and you're either
20 allowed in or you're not or into a community of people.

21 So you have to subscribe and during that subscription
22 process, there's information that's asked that you create
23 what's called a profile. So it provides the ability to create
24 a profile of yourself. In other words, this is who I am, this
25 is my photo or at least the photo I want people to see that

1 represents me, this is some information, how tall I am, am I
2 married or not, am I dating, am I -- what kinds of interests I
3 have and other types of personal information.

4 There's also areas for -- or for open -- what would be
5 called free -- free -- I'm trying to think of the best way to
6 describe it. Instead of checking a box, you can actually
7 write what your own interests are. For example, what kinds of
8 movies do you like and you can fill in the blank and write
9 whatever you want in there.

10 It allows you to search for people of like likenesses to
11 you or other types of searching to see if you can then send
12 what's called a friend request to that other person and if
13 they accept your friend request, then you're now connected.
14 You can see their profile.

15 You can take your information and mark it private or keep
16 it public. Most of the sites if you're under the age of 18
17 will automatically make it private. Some sites for everyone
18 will make it private and not visible until you're registered.

19 You can upload content -- what's called user-generated
20 content, or UGC in short form, which is a video or it can be
21 photographs or it can be pictures that you've created or
22 information you want to write. You can create your own blog
23 on it.

24 So you can also communicate using some of the features
25 that are built inside the social networking site, and

1 oftentimes a social networking site will build a chat
2 capability inside the platform or they will build an instant
3 messaging capability inside the platform or they will build --
4 sometimes it's called private e-mail but in essence it's
5 e-mail except it's happening only inside that circle so
6 it's -- it's not translating between one domain and another.
7 It's simply on the domain of the platform of the company that
8 created it.

9 Q. Okay. Turning to the definition here of -- of social
10 networking site, it talks about a "collection of web sites".
11 Plaintiffs' expert has testified that that would necessarily
12 result in this involving the entire Internet -- the definition
13 incorporating the entire Internet. Would you agree with that
14 conclusion?

15 A. No.

16 Q. Why not?

17 A. I'll say that with due respect, Professor. I think -- I
18 think there's some confusion around "collection of web sites"
19 versus different properties a company owns. So, for example,
20 Google, the company, owns Google Talk, it owns Gmail, it owns
21 I think 72 or something different properties.

22 News Corp. -- News Corporation is the same thing. At the
23 time it owned MySpace, it also owned fox.com, it also owned
24 foxnews.com, AmericanIdol.com, photobucket.com, igr.com,
25 American Idol -- or American -- rotten tomatoes, askmen.com,

1 all the different dot-com properties but when you're talking
2 about a "collection of web sites," you're talking about that
3 one property and all the different pages that are associated
4 to the site because those are the web pages that are part of
5 that web site.

6 Q. So if I conducted a Google search and that search led me
7 to a social networking site, would Google be then -- is Google
8 then a social networking web site?

9 A. Google is the thing that you used in order to find
10 direction. It's almost like your GPS in your car. Actually,
11 it is like your GPS in your car.

12 Q. Let's -- let's go back to (1)(s) one more time --

13 THE COURT: Counsel, it's five clock.

14 MS. SPOHN: Oh, my gosh.

15 THE COURT: Time flies.

16 MS. SPOHN: It does.

17 THE COURT: I won't fill out the remainder of that
18 phrase. I'm perfectly happy to go a little bit later now if
19 you want. You tell me what you'd like to do. If this is a
20 good stopping point, fine --

21 MS. SPOHN: It's a good stopping point, Your Honor.
22 We can continue from here.

23 THE COURT: Okay. Now, having said that tell me how
24 much more time you're going to need.

25 MS. SPOHN: No more than -- I'd say 35 minutes. No

1 more than 30 minutes.

2 THE COURT: Okay. Now I'm going to turn to the
3 plaintiffs. Tell me about airplane reservations.

4 MR. MONAGHAN: While I was sitting here, I had my
5 phone turned off but not on the airplane mode so I did get an
6 E -- a text saying that was -- there was a flight at 1:00 and
7 at 1:40. It sounds like the professor did the same thing.

8 THE COURT: Will that -- will that work with -- with
9 your...

10 PROFESSOR POST: It -- it probably would.

11 THE COURT: Okay. Shall we start at eight in the
12 morning then and then -- and that should -- we ought to be
13 able to conclude with this witness and then if -- then if you
14 want to do your rebuttal -- are you agreed that they can call
15 the professor out of turn in order to do rebuttal which is
16 sort of odd but not really when you think about it because
17 we'll have the experts back-to-back and that kind of makes
18 sense.

19 MS. SPOHN: That's fine, Your Honor.

20 THE COURT: Okay. We'll start at eight in the
21 morning then? Will that work for everyone?

22 MS. SPOHN: Uh-huh.

23 THE COURT: All right. Thank you, sir. You may step
24 down. We'll see everyone in the morning at eight o'clock. We
25 stand in recess.

(Recess had at 5:02 p.m.)

I, Rogene S. Schroder, certify that the foregoing is a correct transcription to the best of my ability from the digital recording of the proceedings held in the above-entitled matter.

/s/Rogene S. Schroder
Transcriber

August 20, 2012
Date

I-N-D-E-X

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WITNESSES:

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EXHIBITS:

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101. Yahoo screen shots	64	65
102. USA Today screen shots	64	65
103. Wikipedia screen shots	64	65
104. What is My IP Address? screen shots	64	65

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4	106. Hulu screen shots	64	65
5	107. Craigslist screen shots	64	65
6	108. LinkedIn screen shots	64	65
7	109. Amazon screen shots	64	65
8	110. YouTube screen shots	64	65
9	111. Film Affinity screen shots	64	65
10	112. Twitter screen shots	64	65
11	113. Google+ screen shots	64	65
12	114. IMDB.com screen shots	64	65
13	115. HomeDepot.com screen shots	64	65
14	116. Pandora screen shots	64	65
15	117. Weather.com screen shots	64	65
16	118. ESPN.com screen shots	64	65
17	119. Flickr screen shots	64	65
18	120. MySpace screen shots	64	65
19	121. Facebook screen shots	64	65
20	122. CNN.com screen shots	64	65
21	123. Times Free Press screen shots	64	65
22	124. Politico screen shots	64	65
23	125. DiabetesDaily.com screen shots	64	65
24	126. BreastCancer.org screen shots	64	65
25	127. Daily Strength screen shots	64	65

	<u>EXHIBITS:</u>	<u>Offered</u>	<u>Ruled On</u>
1			
2			
3	128. Couch Surfing screen shots	64	65
4	129. Live Mocha screen shots	64	65
5	130. Wordpress.com screen shots	64	65
6	131. Skype screen shots	64	65
7	132. Target.com screen shots	64	65
8	133. Husker Spot screen shots	64	65
9	134. SupportGroups.com screen shots	64	65
10	135. Careerbuilder.com screen shots	64	65
11	136. Blogger screen shots	64	65
12	137. eBay screen shots	64	65
13	138. Walmart.com screen shots	64	65
14	139. Acurazine.com screen shots	64	65
15	140. Reddit.com screen shots	64	65
16	141. Foursquare screen shots	64	65
17	142. GoToMeeting.com screen shots	64	65
18	143. Shoutlife.com screen shots	64	65
19	144. WhiteHouse.gov screen shots	64	65
20	145. United States Senate screen shots	64	65
21	146. Governor Dave Heineman screen shots	64	65
22	304. Expert Report of David G. Post	73	73
23	305. Expert Report of Hemanshu Nigam	183	183
24			
25			